Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

_____ TERM

NO. 72-866

DR. JOHN F. COOPER, PETITIONER,

VS:

THE FLORIDA STATE BOARD OF DENTISTRY,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

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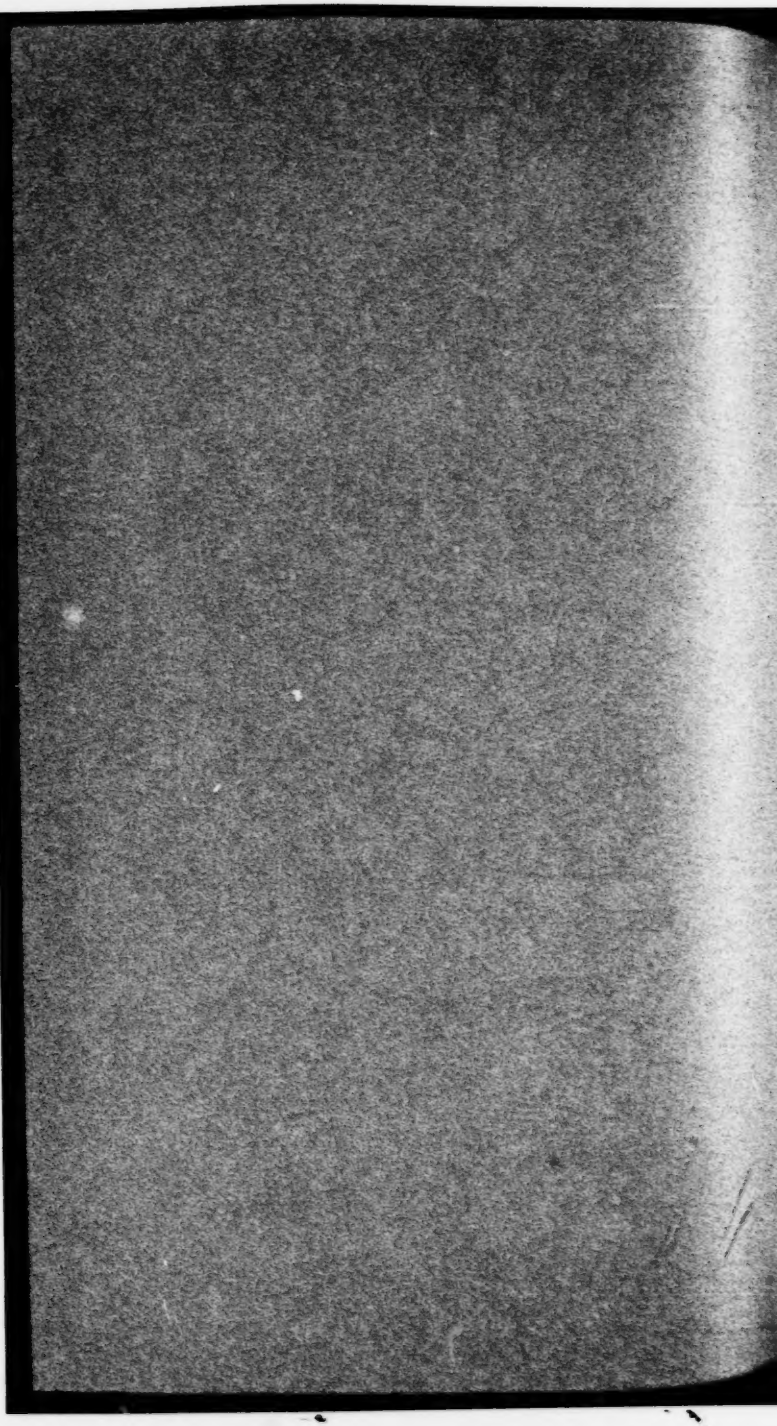

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NO. _____

_____TERM, 1972

IN THE

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DR. JOHN F. COOPER, PETITIONER,

vs:

THE FLORIDA STATE BOARD OF DENTISTRY,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Comes now Dr. John F. Cooper, petitioner in the above-styled cause, and files this, his petition to the District Court of Appeal of Florida, Third District, and in support thereof respectfully submits the following:

OFFICIAL REPORT

1. The denial by the District Court of Appeal of Florida, Third District of the petition for a writ of certiorari to the Florida State Board of Dentistry on July 5, 1972, and the rehearing denial on August 1, 1972, are noted in 265 Southern Reporter Second 432 under "Memorandum Decisions." This is the highest court of the State of Florida in which a decision could be had in this matter.

Copies of all administrative orders and court orders involved in this case were filed in the appendix to the companion case to this case under Cooper v. Florida State Board of Dentistry docketed in this Court on November 25, 1972, as No. 72-774.

GROUNDS

2. (a) The license to practice dentistry of petitioner, as well as any renewals thereof, have been revoked permanently by the Florida State Board of Dentistry under authority of the Florida Statutes

Annotated, 1971, Chapter 466, section 466.24 while this statutory section is vague, indefinite and standardless so as to fail to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by said statute, and requires men necessarily to guess as to its meaning and application, thereby illegally posing a clear, imminent, irreparable and great damage to Dr. Cooper in the loss of his means to a livelihood. For this denial of due process the said statutory section is repugnant to the Constitution of the United States.

In this certain statutory section, the psychiatric disorder is ranked along with other disease deemed dangerous to the public health without delineation.

(b) This certain statutory section also punishes the dentist who becomes mentally ill, (afflicted with psychiatric disorder), or becomes a drug addict.

(c) This certain statutory section treats unequally any dentist who happens to become afflicted

with a psychiatric disorder among the ranks of all dentists similarly situated, while providing no suspension or revocation for the dentist who becomes afflicted with a physical disorder. This unequal protection of the said section is unconstitutional.

(d) The accusation and the order determining Dr. Cooper guilty of certain conduct both rely on an inability of petitioner to manage "his personal and business affairs." While the Florida State Board of Dentistry is carrying out a legitimate police power function under authority of section 466.24, the overbreadth of the section is unconstitutional when it invades petitioner's right to privacy.

(e) Petitioner was denied due process when he was required to go to the defense of his dental license without a meaningful opportunity to prepare a defense to the accusation.

(f) The hearing before the Florida State Board of Dentistry lacked the required appearance of justice when the attorney for the Board held the

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official inconsistent positions of prosecuting petitioner on the accusation and advising the Board of laymen on matters of law during the hearing of the matter.

(g) The Florida State Board of Dentistry failed to strictly construe this penal statute as is required where the entire accusation is drafted in the past tense while the proscribed conduct in the statutory section specifies "is".

(h) Both the accusation and the determination of guilt by the Board were non-specific, open-ended and without limitation where the charges were recited "...but not limited thereto."

(i) The date of the judgment sought to be reviewed is Tuesday, October 3, 1972, and the time of its entry is not noted in said court.

(j) No rehearing was sought in the Supreme Court of Florida, but on Monday, October 30, 1972, a stay of execution was granted allowing petitioner to and including December 4, 1972, to seek review in the Supreme Court of the United States and

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obtain any further stay.

(k) The jurisdiction of this Court to review this case by certiorari rests upon United States Code Annotated, Title 28, section 1257 (3).

FEDERAL QUESTIONS

3. (a) FIRST FEDERAL QUESTION:

Is a state statute, which is penal in nature dealing with the revocation of a dentist's license, repugnant to the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution of the United States if said statute:

(1) Is so vague, indefinite and standardless as to fail to give men of common intelligence fair notice of what it forbids?

(2) Further, causes men to necessarily guess at its meaning and differ as to its application?

(b) SECOND FEDERAL QUESTION:

Is a state statute which is used in performing a valid governmental function unconstitutional for being repugnant to the right to privacy

provision of the Fourth Amendment to the Constitution of the United States if said statute:

(1) By its overbreadth allows an examination of all of the banking records and business practices of a dentist without his consent?

(2) By its overbreadth allows an examination on which to base the conclusion a dentist lacks the ability to manage "his personal and business affairs"?

(3) By permitting such invasions allows an unreaonable search within the meaning of said Amendment?

(c) THIRD FEDERAL QUESTION: Is a state statute repugnant to the Constitution of the United States for denying a right under the Equal Protection Clause of the Fourteenth Amendment if it provides:

(1) A dentist who becomes afflicted with a mental illness (afflicted with a psychiatric disorder) among other dentists similarly situated may have his dental license suspended or revoked while a dentist with a physical disorder is not

penalized?

(2) A dentist who becomes a drug addict among other dentists similarly situated may also be so punished.

(d) FOURTH FEDERAL QUESTION: Is a denial of the right to the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution of the United States for an administrative board hearing an accusation of misconduct charged against a dentist to:

(1) Require the accused dentist to defend his professional license within seventeen days after said dentist was able to retain counsel, where the attempt to retain counsel was limited due to financial reasons?

(2) Require the accused to defend within seventeen days after retaining counsel when the attorney retained asked for a bill of particulars and a continuance, under the circumstances, and both requests were denied?

(3) Allow an attorney only seventeen days to prepare a meaningful defense in such a

case where he needs to find applicable law, locate and interview available witnesses during what was mostly a holiday season, take required depositions, cause the necessary subpoenas to be issued in Jacksonville, Florida, and returned to Miami, Florida, where service on said witnesses was required in Miami, Dade County, Florida, and Sanford, Seminole County, Florida?

(4) Provide the accused dentist with an accusation that recited certain charges of alleged misconduct but specifically state at several places in the accusation "...but not limited thereto"?

(5) Provide the accused dentist with an accusation drafted only in the past tense based upon a statutory provision proscribing conduct of which the accused "is" guilty?

(6) Provide the accused dentist with a determination of fact containing a conclusion of guilt based upon certain allegations stated but followed by "...but not limited thereto"?

(7) Allow the attorney who acted as the prosecutor of the accused dentist in the hearing of the matter on behalf of the board also to advise the board, all of whom were laymen, on questions of law that arose during the hearing?

(8) Revoke the license of a dentist permanently for conduct done before the dentist had been hospitalized and had received three months of psychiatric rehabilitative treatment, and had been returned to the practice of dentistry by the attending psychiatrist?

STATUTES AND PROVISIONS

4. "466.24 Suspension or revocation of license certificate for cause.--The board shall suspend or revoke the license of any dentist or dental hygienist when it is established to its satisfaction that he:

(1) Is a habitual user of intoxicants, or drugs or is afflicted with physical disability, senility, psychiatric disorders or other

disease deemed dangerous to the public health, thus rendering him unfit for the practice of dentistry or dental hygiene.

(2) Is grossly ignorant or incompetent.

(3) Has been guilty of:

(a) Misconduct either in his business or in his personal affairs which would bring discredit upon the dental profession;

(b) Fraud, deceit or misrepresentation in obtaining his license;

(c) Malpractice;

(d) Wilful negligence in the practice of dentistry or dental hygiene;

(e) Employing or permitting any unlicensed person or persons to perform any work in his office, which would constitute the practice of dentistry or dental hygiene, except a dental auxiliary pursuant to the provisions of this chapter;

(f) Publication or circulation

directly or indirectly of any fraudulent, false or misleading statements as to the skill or methods of practice of any person;

(g) Advertising in any manner his professional services in the practice of dentistry or the cost or fees therefor in this state in a manner not expressly authorized by this chapter; claiming or inferring of professional superiority over other practitioners;

(h) Employing or using a solicitor or other agent to obtain patronage;

(i) Giving a public demonstration of skill or methods;

(j) Practicing dentistry along the streets or highways or any place other than the office where the licensee regularly practices dentistry except as provided by this chapter;

(k) The public exhibition or use of specimens of dental work, large display signs or lighted signs, electric or neon or any

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other media of calling the attention of the public to any person engaged in the practice of dentistry or dental hygiene;

(l) Failure to provide and maintain reasonably sanitary facilities and conditions;

(m) Failure to provide adequate radiation safeguards; or,

(n) Violating any other provision of this chapter regulating the practice of dentistry or dental hygiene."

This statutory section is to be found in the Official Florida Statutes, 1972 Supplement, at pages 456 and 457.

'MEDICAL PRACTICE ACT"

"458.1201 Denial, suspension, revocation of license; disciplinary powers.--

"(1) The board shall have authority to deny an application for a license or to discipline a physician licensed under this chapter or any

antecedent law who, after hearing has been adjudged unqualified or guilty of any of the following:

"(n) Being unable to practice medicine with reasonable skill and safety to patients by reason of illness, drunkenness, excessive use of drugs, narcotics, chemicals, or any other type of material or as a result of any mental or physical condition. In enforcing this paragraph the board shall, upon probable cause, have authority to compel a physician to submit to a mental or physical examination by physicians designated by it. Failure of a physician to submit to such examination when directed shall constitute an admission of the allegations against him unless the failure was due to circumstances beyond his control, consequent upon which a default and final order may be entered without the taking of testimony or presentation of evidence. A physician affected under this paragraph shall at reasonable intervals be afforded an opportunity to demonstrate that he can resume the competent practice of medicine with

reasonable skill and safety to patients."

CONSTITUTION OF THE UNITED STATES

OF AMERICA

AMENDMENT 4

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT 5

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT 14

"SECTION 1. All persons born or naturalized in the United States, and subject ot the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the

United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

FACTS

5. Petitioner's license to practice dentistry, as well as any renewals thereof, have been revoked permanently by an order of the Florida State Board of Dentistry under authority of the Florida Statutes Annotated, 1971, Chapter 466, section 466.24, while this statutory section is so vague, indefinite and standardless as to fail to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by this penal statute requiring men necessarily to guess at its meaning and application, thereby illegally posing a clear, imminent, irreparable and great loss to Dr. Cooper in the loss of his means to a livelihood.

Petitioner Cooper entered the Veteran's Administration Hospital in Miami, Florida, on July 14, 1971, and was discharged on October 4, 1971.

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His treating psychiatrist, Dr. James Goodman, kept Dr. Cooper in the classical psychiatric ward until August 29, 1971, when Dr. Cooper was allowed to enter the Human Relations Laboratory for exchanges with other patients and further treatment there until he was discharged as able to return to work. When queried on the hearing of this matter as to the cause of his hospitalization being drug addiction or alcoholism, or both, Dr. Cooper stated the cause was more complex than that. His uncontradicted testimony was that he was emotionally ill. On his release petitioner returned to work as a dentist with the Seminole County Health Department at Sanford, Florida, where he yet works.

Charges were filed against petitioner with the Secretary-treasurer of the Florida State Board of Dentistry on December 10, 1971.

All of the charges made were based on conduct prior to the hospitalization of petitioner. Charges began with conduct on August 22, 1963, and ended with conduct shortly before petitioner's

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hospitalization on July 14, 1971. No charges of misconduct were made for any conduct of petitioner after his release from the psychiatric ward of the hospital.

The accusation made against Dr. Cooper was open-ended.

"The above described acts, all of which violate Chapter 466 of the Florida Statutes are in violation of Section 466.24 (1), (3) (a) (c) (d) (1) (n), of the Florida Statutes, but not limited thereto."

The accusation made against Dr. Cooper included charges of misuse of his "personal and business affairs" and abuse of checking accounts and writing of "bad checks" on old checking accounts.

These charges were served upon petitioner by certified mail on the 13th day of December, 1971. He then began his search for an attorney to aid him in his defense, but, due to his limited financial resources, he was unable to retain counsel until December 28, 1971, and the "Notice of Hearing" set

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the date of hearing on January 14, 1972.

This allowed petitioner's counsel a period of only seventeen days in which to investigate the charges, make discovery of the evidence against petitioner held by the Florida State Board of Dentistry, find applicable law, locate available witnesses, take required depositions, cause the necessary subpoenas to be issued in Jacksonville, Florida, and to be returned to Miami, Florida, for service in Miami, Florida, and in Sanford, Seminole County, Florida. This seventeen day period was during a holiday season when many people were unavailable to counsel for petitioner due to being out of town or busy with seasonal commitments.

Petitioner's motions for a continuance and bill of particulars were denied by the respondent.

A hearing was held. On the hearing of this matter, Mr. Randle, the attorney who had advised the Florida State Board of Dentistry they had good legal cause to prosecute Dr. Cooper, advised the

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Board on matters of law. Mr. Randle also presented the case against Dr. Cooper as the attorney for the Board.

The Board, in addition to ruling on legal questions as they arose throughout the hearing, made the finding of guilty.

The determination of fact finding Dr. Cooper guilty was written, however, in the same open-ended fashion as the accusation.

"4. The above described acts, all of which violate Chapter 466 of the Florida Statutes, are in violation of Section 466.24 (1), (3), (a) (c) (d) (1) (n), of the Florida Statutes, but not limited thereto."

Also the Board concluded petitioner was unable to manage his "personal and business affairs".

FEDERAL QUESTIONS RAISED

6. The stay granted by the Supreme Court of Florida on Monday, October 30, 1972, halted all

proceedings in said court as well as proceedings in the District Court of Appeal, Third District, and the Circuit Court for the Eleventh Judicial Circuit of Florida in and for Dade County to and including December 4, 1972, to allow petitioner to seek review in the Supreme Court of the United States and obtain any further stay.

The first federal question raised dealing with the indefinite, vague and standardless quality of Section 466.24 of the Florida Statutes was raised before the Florida State Board of Dentistry in a Motion to Dismiss where petitioner wrote:

> 'Comes now Dr. John F. Cooper in person and by his attorney, Glyn Dial Ellis, and does respectfully move the Florida Board of Dentistry to dismiss the charges against him in the 'Accusation' sworn to December 9, 1971, on the ground that the 'Accusation' is based upon Chapter 466 of the Florida Statutes which is unconstitutional due to being vague, ob-

scure, indefinite, ambiguous and written without prescribed standards which would determine the necessary degree of wrongdoing in order to sustain a finding of conduct sufficiently improper or improperly motivated so as to entitle the Board to find against Dr. Cooper and to penalize him under the Florida Statute authorizing a penalty.

"Additionally, the 'Accusation' is not drafted in the present tense so as to meet the requirement that Dr. Cooper 'is' a user as described and there are no facts stated in the 'Accusation' that sustain a finding that this is true. In other words, the 'Accusation' recites the law in this particular section but states no facts to sustain such conduct on the part of Dr. Cooper presently.

"Additionally, the Florida

Statutes, Section 466, is unconstitutional on the ground that it does not inform an ordinary man of the kind and degree of conduct that would be sufficient to sustain the finding for a penalty against such ordinary man.

"Additionally, Chapter 466 of the Florida Statutes contains no definitions of the relationships and required conditions in order to inform Dr. Cooper, or any ordinary man, of such conditions as would sustain the finding of a penalty against him under this certain chapter.

"Done at Miami, Florida, this December 31, 1971."

BOARD'S RULING ON MOTION TO DISMISS

"COMES NOW the Florida State Board of Dentistry, by and through its undersigned attorney, and for answer to

the Accused's Motion to Dismiss states said Motion is denied.

"DATED this 10th day of January, 1972.

RICHARD L. RANDLE, For and at the direction of the Florida State Board of Dentistry"

Prior to the hearing of this matter by the Florida State Board of Dentistry, petitioner sought an injunction in the Dade County Circuit Court as well as a Declaratory Judgment of his rights in the following:

"APPLICATION FOR DECLARATORY JUDGMENT

TO THE HONORABLE JUDGE OF THE DADE COUNTY CIRCUIT COURT:

"Plaintiff, Dr. John F. Cooper, presents his Application for a Declaratory Judgment seeking declaratory and injunctive relief involving the following agency and state officials:

"The Florida State Board of Dentistry; John A. Stewart, D.D.S., Secretary-Treasurer of the Florida State Board of Dentistry; Robert M. Denton, D.D.S., Executive Director and Assistant Secretary-Treasurer of the Florida State Board of Dentistry; Robert Shevin, Attorney General of the State of Florida; and Louis H. Ritter, Secretary of the Department of Professional and Occupational Regulation.

"1. Plaintiff brings this action for relief under Chapter 86, Declaratory Judgments, Florida Statutes, 1969, as amended, whereunder the plaintiff prays the Court will render declaratory judgments and supplemental relief on the existence of any immunity, privilege, right or status now existing belonging to the the plaintiff as well as a declaration of equitable and legal relations of the

parties to this controversy as they are affected by the following:

"3 (C) Plaintiff further prays the Court determine the construction and/or constitutionality in said Chapter 466 of the two Sections, 466.24 'Suspension or Revocation of License Certificate for Cause' and Section 466.25 'Filing of Accusations Against Dentists, Dental Hygienists or Dental Laboratories, Notice, Hearing, Review'.

'Plaintiff alleges the statutory sections 466.24 and 466.25 are unconstitutional and therefore void due to being vague, ambiguous and indefinite with a failure to promulgate standards of misconduct and/or conduct designed to bring discredit to the practice of dentistry and by reason of their failure to assure plaintiff equal

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protection of the law and due process of law. By these sections plaintiff is denied knowing with what he is charged since a man of common intelligence must necessarily guess at their meaning and differ as to their application.

"There are no definitions extant in the Florida Statutes, or elsewhere, governing the terms used in said sections so that plaintiff is unable to determine whether the wrongdoing includes associations or beliefs or other conduct in his 'personal affairs'."

"4 (D) By the terms of the 'Accusation' plaintiff is accused of having violated section 466.24 (3) (n), Florida Statutes, 'but not limited thereto'. A statement of such violations under various sections of 466.24 'but not limited thereto' are found on pages 2, 3, 4, 5, 6, and 7 of said 'Accusation'.

"The 'Accusation' specifies violation of any other provision of Chapter 466 relating to the practice of dentistry or dental hygiene in its charge of having violated section 466.24 (3) (n).

"The 'Accusation' states Dr. Cooper 'was an alcoholic', while the law on revocation uses the verb, 'is a (sic) habitual user of intoxicants...'"

ORDER

"THIS CAUSE came on to be heard before me on Plaintiff's Application for injunction and Defendants' Motion to Dismiss, after notice and the Court having examined the pleadings and memorandum filed in said cause and having heard argument of counsel, it is thereupon,

ORDERED AND ADJUDGED:

1. That said Application be and the same is hereby denied.

2. That this cause be and the same is

hereby dismissed with prejudice and at Plaintiff's cost.

DONE and ORDERED in Chambers, at Miami, Dade County, Florida, this 14th day of January, 1972."

Because of the ruling laid down in the Kionka case wherein the trial court in its final judgment or decree is required to directly pass upon the validity of a statute, or undertake to set forth a construction of the constitutional provision, no appeal was allowed to the Supreme Court of Florida from this denial. See In re Estate of Anna Z. Kionka, 121 Southern Series 2d 644. See especially page 646.

The matter came on to be heard by the Board whose order is found in the appendix of this matter beginning at page one.

Petitioner next sought a writ of certiorari in the District Court of Appeal of Florida, Third District, where the first federal question was raised in the petition and brief as follows:

"A. The statutory section which was the basis for the revocation of the license of Dr. Cooper is unconstitutional in those specific sections which were the bases of the charges against him as well as those statutory sections being unconstitutional which were the bases of the revocation of his license.

"The acts described in the accusation allegedly violate Chapter 466 of the Florida Statutes and are presented by the Board as being in violation of 'Section 466.24 (1), (3) (a) (c) (d) (1) (n), Florida Statutes but not limited thereto'.

"The Order revoking the license of Dr. Cooper found him guilty '...of violating Chapter 466 of the Florida Statutes, and in particular Section 466.24 (1), (3) (a) (c) (d) (1) (n),

of the Florida Statutes, but not limited thereto...'.

"These certain statutory sections are vague and standardless leaving the dental profession uncertain as to the conduct they prohibit and leaves administrative boards without any legally fixed standards to guide them.

"B. Additionally, that Section 466.24 (3) (a) is violative of petitioner's constitutional right to privacy.

"C. Petitioner was denied due process of law in the following instances:

(1) When he was denied a continuance which would have allowed counsel for petitioner an opportunity to prepare for the defense of this case in a reasonable time. While the

State had months to prepare its case, petitioner had at most less than twenty (20) days and, under the facts of this case, to have denied petitioner a continuance was error. Counsel for petitioner needed time for discovery, investigation, study of the applicable law and preparation of the defense. A meaningful opportunity to be heard is requisite to fairness.

"(2) The hearing in this matter did not have the appearance of justice where the attorney who acted as prosecutor was also advisor to the Board performing a quasi-judicial function in determining guilt and ruling in matters of law.

"(3) The failure of the Board to provide Dr. Cooper with a specific and definite 'Accusation', which they refused to correct when they denied

petitioner's Motion for a Bill of Particulars, was error. The granting of a list of witnesses did not correct this error.

"(4) The drafting of the 'Accusation", where it was based upon Section 466.24 (1), was error and constituted no charge against Dr. Cooper since it was drafted in the past tense and did not accuse the petitioner of being guilty of such conduct as is proscribed at the time of the 'Accusation' or as the Section specifies 'is'."

"(5) The 'Accusation' did not inform the petitioner of the charges against him since the charges made recite certain Sections of Chapter 466 but specifically state 'but not limited thereto'. This information that the 'Accusation" against Dr. Cooper is not limited to the certain sections of the

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statutory charge made is repeated at least once on five of the seven pages of the 'Accusation". Under this information, petitioner had no way of knowing what he had specifically to meet and disprove.

"(6) The Order of revocation of the license of Dr. Cooper was not based upon the charges made against him nor upon the evidence submitted but as stated in Paragraph 4 of said Order, '...John F. Cooper guilty of violating Chapter 466 of the Florida Statutes, and in particular Section 466.24 (1), (3) (a) (C) (d) (1) (n), of the Florida Statutes, but not limited thereto...'."

(Underlining is mine).

"(7) The conduct of the Board in revoking the license of Dr. Cooper was arbitrary and unreasonable

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under the facts of this case. Such an Order was an abuse of their discretion in view of the rehabilitative psychiatric treatment received by Dr. Cooper before any of the charges were filed against him."

In the argument of the brief filed in the District Court of Appeal beginning at page seven (7) these federal questions were pursued:

"It is difficult to understand what it is the Florida State Legislature forbids by this Chapter 466, Section 24. The law is so drafted as to mean different things to a man of common intelligence so that he must necessarily guess at the meaning of the Section; and, of course, the Florida State Board of Dentistry would be allowed to differ as to the application of the law because of the nature of the language. For example:

"'466.24 (1) Is a (sic)

habitual user of intoxicants or drugs....'.

'What is 'a (sic) habitual user of intoxicants'? Would it be fair to say that a man who takes a cocktail every evening before dinner is an habitual user of intoxicants? Is this disabling?

'What is an habitual user of drugs? What are drugs? Does the Florida State Legislature mean all drugs which one might use habitually or are there certain drugs with a deleterious effect which they had specifically in mind?

'466.24 (1) ...is afflicted with physical disability, senility, psychiatric disorders...'

"If a dentist were to be afflicted with a severe case of arthritis, would that be a sufficient physical disability to allow suspension or revocation of his license?

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'Webster's Third New International Dictionary defines 'senility' as 'the quality or state of being senile'. "Senile" is defined therein as 'of, relating to or characteristic of old age'.

"'Psychiatric disorders' would include both neuroses and psychoses. Even psychiatrists would disagree as to what psychiatric disorders are, and the extent of disability flowing from each psychiatric disorder would also be the bases of professional differences of opinion.

> "'466.24 (1) ...or other disease deemed dangerous to the public health, ...'

"Is there no disease deemed dangerous to the public health that is not communicable at some stage? Is it the intention of the Legislature to suspend or revoke the licenses of dentists

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who have diseases that are dangerous to the public health even when such diseases are not communicable or are not in a communicable stage?

> "'466.24 (2) Is grossly ignorant or incompetent;'

"How could a man be deemed grossly ignorant who had received a license to practice dentistry in the State of Florida?

"Is a dentist who achieves several poor results on patients over several years of time incompetent? What if he achieves several poor results in a short period of time? Is that enough to make him incompetent?

> "'466.24 (3) Has been guilty of: (a) Misconduct either in his business or in his personal affairs which would bring discredit upon the dental profession.'

"If a dentist belonged to clubs which were Communistic or anti-religious, would that be misconduct in his personal

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affairs which would bring discredit upon the dental profession?

'What if a dentist actively participated in either marches for peace or civil rights? Would this be such discredit?

'What if a dentist were to file a bankruptcy petition in his business, would this be misconduct in his business which would bring discredit upon the dental profession? What if he had a reputation for not paying his bills until 120 days after they were due, thus achieving a poor credit rating? Would that be such a discredit to his profession?

"'466.24 (3) (c) Malpractice;'

'What is meant by malpractice for the purposes of this section?

> "'466.24 (3) (d) Willful negligence in the practice of dentistry or dental hygiene;'

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"Is a man who is mentally ill and willfully negligent in the practice of dentistry to have his license suspended or revoked, the same as a man who is not mentally ill and acts willfully negligently?

"'466.24 (3) (l) Failure to provide and maintain reasonably sanitary facilities and conditions;'

'What is 'reasonable'? Whose standard shall we apply?

'While Subsection (m) requires adequate radiation safeguards, it does not specify the purpose for such radiation safeguards in order that standards might be known, as they are generally known in the profession, or by standards promulgated in this Chapter.

"'466.24 (3) (n) Violating any other provision of this chapter regulating the practice of dentistry or dental hygiene.'

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"This Subsection could either be a repetition of other provisions of Section 24 which we have already questioned or it could be any other provision of this Chapter applicable or inapplicable to an individual dentist."

The second federal question raised below on the overbreadth of the statute allowing an invasion of petitioner's right to privacy at page 13 in the brief submitted to the District Court of Appeal:

'Misconduct in the personal affairs of an individual without a standard being set by the State Legislature is open to such abuse in sensitive areas of basic freedoms guaranteed an individual by the Bill of Rights that such statute must be unconstitutional."

The third federal question was raised in the Dade County Circuit Court and the District Court

of Appeal. This question rested on the right insured petitioner in the Equal Protection Clause of the Fourteenth Amendment.

In the brief filed with the District Court of Appeal beginning at page 13 the following argument was made:

> "In the area of the psychiatric disorders this Section 24 does not fairly treat any dentist who may become ill with a psychiatric disorder as opposed to a physical disorder. This statute still treats the psychiatric disorder as though it were a human infirmity arrived at in some fashion different to that of a physical disorder. A reading of the Section reveals that no dentist who becomes physically ill is to be suspended whereas a dentist suffering a psychiatric disorder is to be suspended. Again, no provision is made for any condition, exception, or unusual circumstances.
>
> "The medical profession has met

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the same problem of the sick doctor by providing in Florida Statute 458.1201, Subsection (n) as follows:

'Being unable to practice medicine with reasonable skill and safety to patients by reason of illness, drunkenness, excessive use of drugs, narcotics, chemicals, or any other type of material or as a result of any mental or physical condition. In enforcing this paragraph the board shall, upon probable cause, have authority to compel a physician to submit to a mental or physical examination by physicians designated by it. Failure of a physician to submit to such examination when directed shall constitute an admission of the allegations against him unless the failure was due to circumstances beyond his control, consequent upon which a default and final

order may be entered without the taking of testimony or presentation of evidence. A physician affected under this paragraph shall at reasonable intervals be afforded an opportunity to demonstrate that he can resume the competent practice of medicine with reasonable skill and safety to patients.'"

Again in the third federal question dealing with the denial of due process, petitioner argued in the Third District Court of Appeal brief at 21:

"In the instant matter on the subject of the 'appearance of justice' I respectfully submit to the Court that it was error for Mr. Randle to be the prosecuting attorney, advisor to the Board on matters of law during the trial of the matter, as well as being the attorney for the Board who advised them when they had a sufficient amount of evidence to proceed against Dr. Cooper. Again, the 'appearance of justice' was lost when the Board was the client of Mr. Randle and at the same time sat as the judge and jury ruling on matters of law and fact in the hearing of this case. No criticism is intended of the Board or Mr. Randle, but it is a difficult thing to explain to an individual who has been accused of misconduct by the Florida State Board of Dentistry how the attorney who is prosecuting him can advise the

Board that is trying him on matters of law and evidence in the trial."

"Had petitioner been granted a meaningful opportunity to be heard, it might have been that the license of Dr. Cooper would not have been revoked. A man sued for one thousand dollars would have had a greater opportunity to defend his one thousand dollars than Dr. Cooper had to defend his license, even if you assume that Dr. Cooper had thirty days in which to prepare a defense. No fair minded court would require a man to go to trial if he were sued for one thousand dollars without an opportunity to take necessary depositions and investigate the suit filed against him."

The District Court of Appeal denied the petition for writ of certiorari as well as the petition for a rehearing without initially passing

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upon the validity of the state statute in question so petitioner was unable to appeal to the Supreme Court of Florida. Or, restated, he did attempt an appeal to the Supreme Court of Florida and it was dismissed. See Appendix, pages 24,25.

Petitioner also attempted to perfect an appeal by writ of certiorari on the ground that the decision in the instant case was in conflict with State v. Pattishall, 126 Southern 147, 99 Florida 296 (1930), which requires a statute which is penal in nature to be strictly construed and strictly followed. The Supreme Court of Florida denied the petition for certiorari.

ARGUMENT UNDER FIRST FEDERAL QUESTION

Does Dentist Cooper have the same right as a man accused of a crime to raise the objection of vague, indefinite and standardless where his accusation arose under a "penal" statute rather than a "criminal" statute?

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This objection was raised successfully in two "criminal" matters before this Court recently. See Rabe v. Washington, 405 United States 313 (1972); and, Papachristou v. City of Jacksonville, 405 United States 156 (1972).

Yes, this Court answered in Giaccio v. Pennsylvania, 382 United States 399 (1966) at page 402:

'Whatever label can be given the 1860 Act there is no doubt that it provides the State with a procedure for depriving an acquitted defendant of his liberty and property. Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute. So here this state Act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague."

See also Cramp v. Board of Public

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Instruction, 368 United States 278 (1961); and Small Company v. American Sugar, 267 United States 233 (1925).

If one may challenge the statute on this vice, then does section 466.24 qualify as vague?

I submit this section has not the remotest suggestion of a standard, but only contains a listing of certain habits, practices, conditions, afflictions, "or other disease deemed dangerous to the public health", and ipso facto, "thus rendering him unfit for the practice of dentistry or dental hygiene."

ARGUMENT UNDER SECOND FEDERAL QUESTION

All of the banking records and checks of Dentist Cooper were searched for over a several-years-period without his consent!

From this illegal search grew that part of the accusation, "...and not being able to properly cover checks drawn on old checking accounts that had been closed and otherwise that the said Dr.

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John F. Cooper would write and cash 'bad checks' and otherwise was unable to properly perform the necessary and proper business functions of his office...".

The men hearing the evidence used it to conclude petitioner was guilty when they wrote: "...and due to the inability of the said Dr. John F. Cooper to manage his personal and business affairs, it was necessary for the said Dina Leopardi to take charge of his entire finances for his said dental offices and to open bank accounts for the said Dr. John F. Cooper's dental practice in her name..." See Appendix, page 5.

The settled rule of law is that "A governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."

See Griswold v. State of Connecticut, 381 United States 479 (1965). See especially page

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485.

ARGUMENT UNDER THIRD FEDERAL QUESTION

Part (1)

Petitioner was hospitalized for three months for being mentally ill. He is now suffering the possible loss of his dental license permanently because of conduct while mentally ill.

What if petitioner had only become physically ill? This section 466.24 provides no punishment for a dentist who becomes physically ill.

How is one illness cause for different treatment to another illness? No one would suggest mental illness is anything but illness.

Under Smith v. Texas, 233 United States 630 (1913) a statute may not lay down a test whereby competent men may be excluded from earning a livelihood while other competent man may not.

Is it equal protection under the law to punish the man who becomes mentally ill while not

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punishing the one who becomes physically ill?

The medical doctors of Florida are protected from this punishment of the ill by statutory provision section 458.1201 where a mental or physical examination is called for. Why are dentists not given equal protection?

ARGUMENT UNDER THIRD FEDERAL QUESTION

Part (2)

On the subject of drug addiction, this Court wrote in Robinson v. California, 370 United States 660 (1962) at page 676:

"We should show the same discernment respecting drug addiction. The addict is a sick person. He may, of course, be confined for treatment or for the protection of society. Cruel and unusual punishment results not from confinement, but from convicting the addict of a crime. The purpose of § 11721 is not to cure, but to penalize."

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The purpose of section 466.24 is to suspend or revoke the license of a dentist for drug addiction. Is this to cure or to punish?

In Furman v. Georgia, 408 United States 238 (1972) this Court stated:

"A State may not punish a person for being 'mentally ill', or a leper, or ...afflicted with a venereal disease."

Again, does section 466.24 have as its purpose to protect the general welfare or to punish the dentist who offends thereunder?

A recent report of the Board of Trustees of the American Medical Association 'Report T (C-72)" dealing with the title "Physicans with Psychiatric Disorders, Including Alcoholism and Drug Dependence" was presented by Dr. John R. Kernodle, M.D., Chairman.

This report demonstrates the extent and result of mental illness in doctors nationally:

"Apart from the cases of alcohol

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and drug dependence which come before disciplinary bodies with relatively high frequency, there are, as in the general population, other less visible diagnostic entities of mental disorders occurring with, perhaps, greater frequency among physicians. Specific studies of the epidemiology of mental disorder in physicians are few, but Duffy, in a 1967 survey of physicians treated at the Mayo Clinic, found the following diagnoses in order of prevalence: affective psychosis, psychoneurosis, schizophrenia, personality disorder, and organic brain syndrome. (References omitted)

"The psychotic reactions, without question, impair the ill physician's judgment and ability to practice, and a psychoneurosis or a personality disorder of sufficient degree can constitute a similar risk to the safety of the patient.

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"Suicide is generally accepted to be one of the major behavioral consequences of mental illness. Demographic data were compiled on 249 physicians listed as suicides in the JAMA obituary columns from May 1965 to November 1967. Suicides exceeded the combined deaths from automobile accidents, plane crashes, drowning and homicide. In addition, 56 deaths were reported as possible suicides. The total of all these violent deaths is 534, or over 5% of all the physicians' deaths during that period.

"The mean suicidal age was 49, at or near the usual productive peak for a physician. Abuse of alcohol or drugs was an important factor in two-fifths of the cases and depressive illness was very common. Medical specialty was a significant variable: Suicide ranged from a low of .01% of pediatricians to a high

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of .06% of psychiatrists. (Reference omitted)

"The approximately 100 physicians who commit suicide annually equal the size of the average medical school graduating class."

ARGUMENT UNDER FOURTH FEDERAL QUESTION

Parts (1), (2) and (3)

A meaningful opportunity to be heard means more than to be able to subpoena a group of past patients to speak in your behalf. It must include the right of counsel to have an opportunity to prepare for the trial of a serious matter before going to a hearing.

The benefit is not in having counsel, but in having counsel who has had time to prepare.

ARGUMENT UNDER FOURTH FEDERAL QUESTION

Part (4)

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If a man receives an accusation containing allegations of violations under certain statutory sections "...but not limited thereto", what is he accused of having done?

ARGUMENT UNDER FOURTH FEDERAL QUESTION

Part (5)

If a legislature wisely sets a present tense condition of the verb "is" in a penal statutory section, may an administrative board remove that limitation by applying the verb as though it had been written "was"?

ARGUMENT UNDER FOURTH FEDERAL QUESTION

Part (6)

If a man is found guilty of violating certain sections of a statute "...but not limited thereto", what is he guilty of having done?

ARGUMENT UNDER FOURTH FEDERAL QUESTION

Part (7)

Mr. Randle was charged with prosecuting Dr. Cooper and advising the body wich determined

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guilt on questions of law during the trial. This is a public official occupying two practically and seriously inconsistent position.

See Tumey v. Ohio, 273 United States 510 (1927). Especially page 534.

To perform its high function in the best way, justice must satisfy the appearance of justice.

PRAYER

Wherefore, petitioner prays that the judgment, decision and revocation of the license of Dr. John F. Cooper to practice dentistry in Florida, as well as any renewals thereof, by the Florida State Board of Dentistry on January 15, 1972, and affirmed by the District Court of Appeal, Third District, in Case No. 72-294, with petition for a writ of certiorari denied by the Florida Supreme Court in Case No. 42-694 and the appeal to the Florida Supreme Court dismissed in Case No. 46-670 be set aside, vacated, and held for naught; that the petitioner's writ of certiorari

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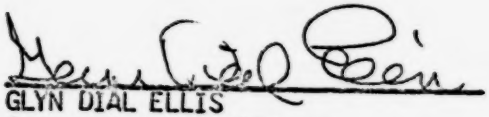
be granted and the judgment, decision and revocation of said license together with the orders of denial and dismissal affirming said judgment, decision and revocation of said license together with the orders of denial and dismissal affirming said judgment, decision and revocation be reversed and that this Honorable Court issue said writ to the District Court of Appeal of Florida, Third District, as prayed for herein by petitioner.

Respectfully submitted,



GLYN DIAL ELLIS
Attorney for Petitioner
1451 North Bayshore Drive
Suite 518
Miami, Florida 33132

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CERTIFICATE OF SERVICE

I, Glyn Dial Ellis, the undersigned attorney for petitioner in the above-styled cause, do certify that on this 12th day of December, 1972, I mailed three copies of this petition for a writ of certiorari and appendix to Richard L. Randle, Esquire, attorney for the Florida State Board of Dentistry, to his proper address with sufficient postage attached thereto.

GLYN DIAL ELLIS

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IN THE

SUPREME COURT OF THE UNITED STATES

DEC 13 1972

MICHAEL RODAK JR. CLERK

_____ TERM

NO. _____

DR. JOHN F. COOPER, PETITIONER,

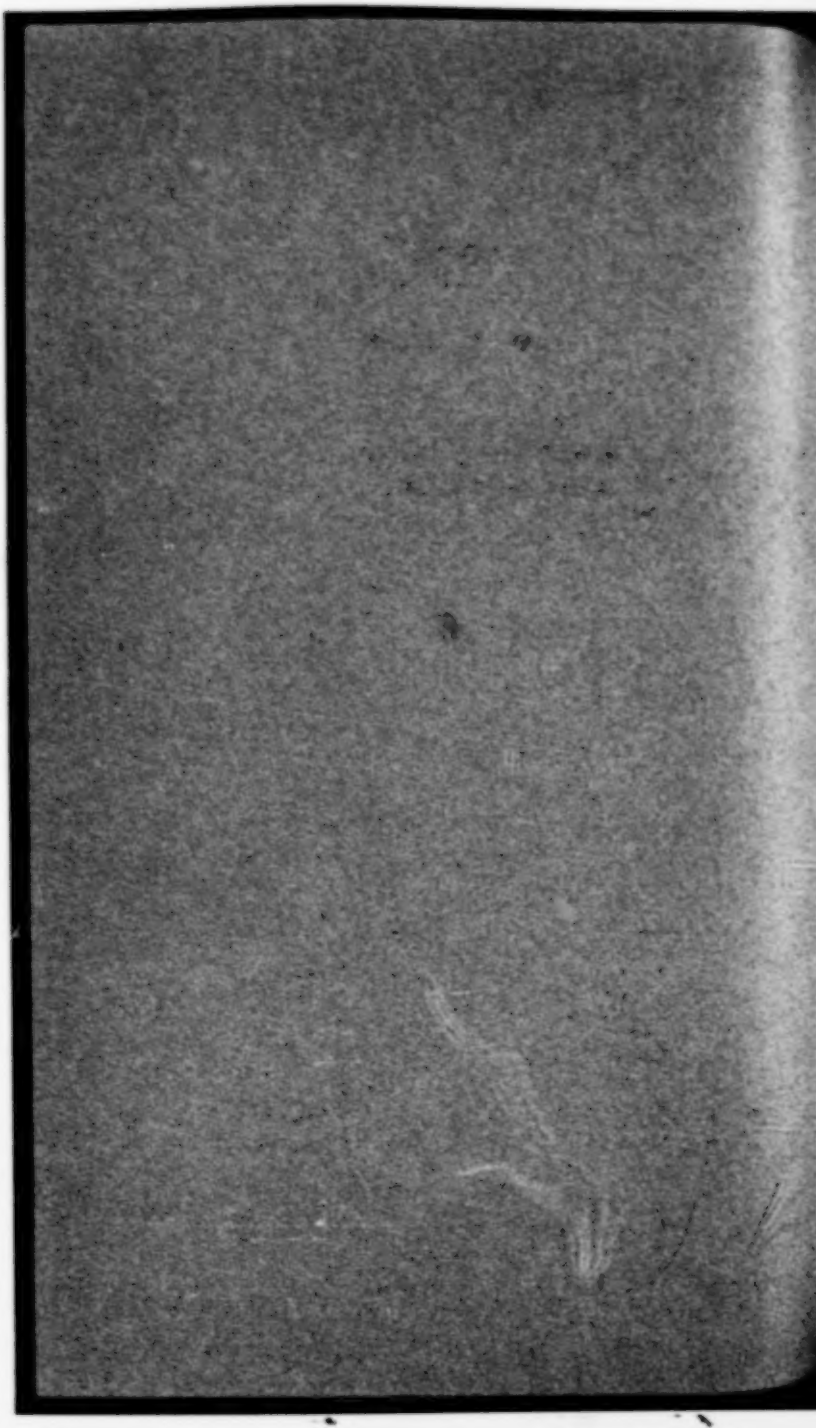
vs:

THE FLORIDA STATE BOARD OF DENTISTRY,

RESPONDENT

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

GLYN DIAL ELLIS
Attorney for Petitioner
Suite 513
1451 North Bayshore Drive
Miami, Florida 33132



APPENDIX

SUBJECT INDEX

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Accusation by the Florida State Board of Dentistry against Dr. John F. Cooper	1

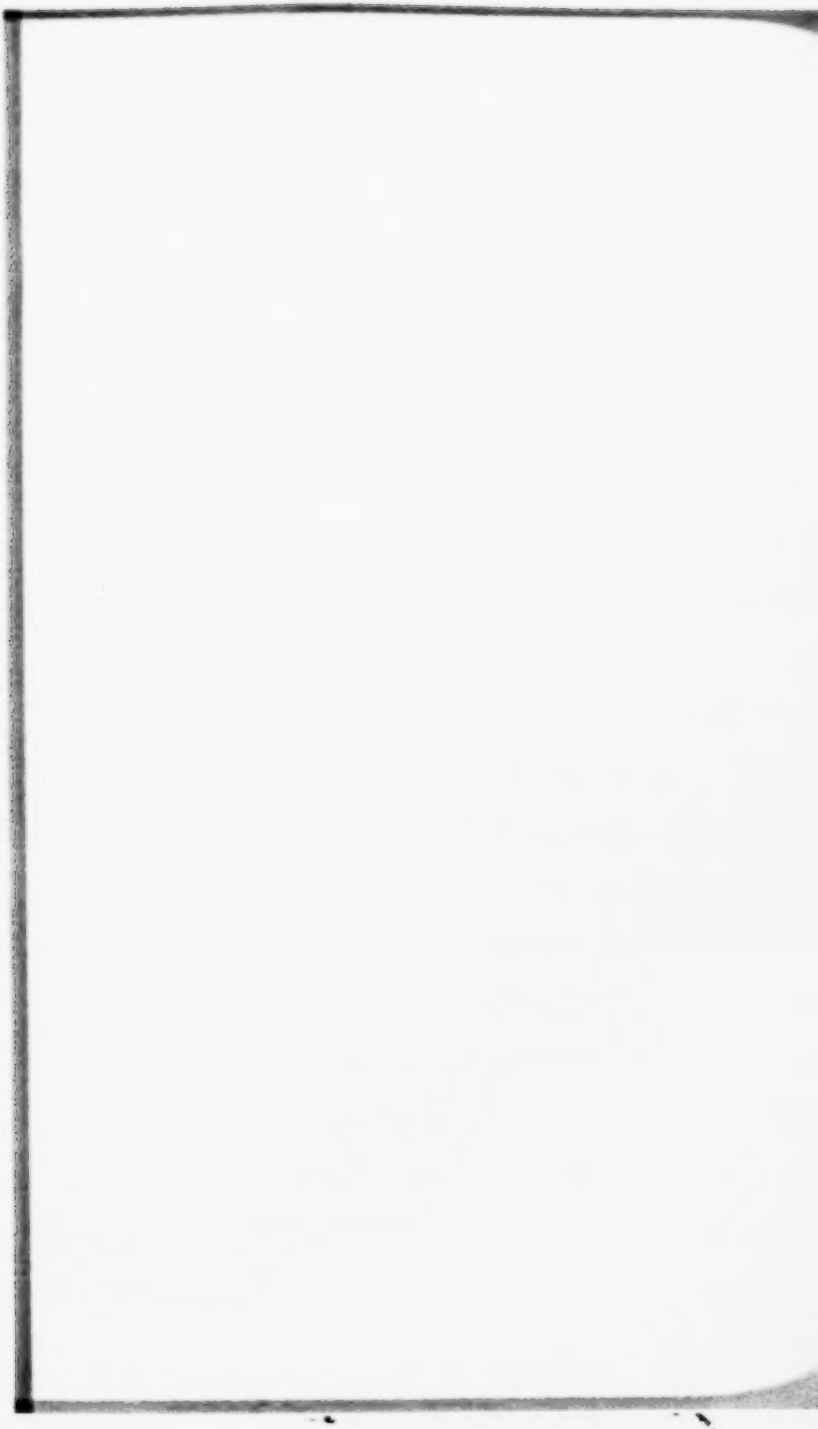
ACCUSATION

STATE OF FLORIDA)
: ss
COUNTY OF DUVAL)

Before me, the undersigned, an officer duly authorized by the laws of the State of Florida to administer oaths, on this 9th day of December, A.D. 1971, personally appeared Dr. Robert M. Denton, Assistant Secretary-Treasurer and Executive Director of the Florida State Board of Dentistry, who having been first duly sworn, deposes and says:

1. That Dr. John F. Cooper, a resident of Florida, is a licensed dentist to practice dentistry under the laws of the State of Florida, Chapter 466 of the Florida Statutes, license issued August 8, 1952, bearing no. 1514, renewed October 1, 1971, bearing certificate number 2711, and was at the time of the acts described below, engaged in the practice of dentistry in Greater Miami, Dade County, Florida.

2. That Dr. John F. Cooper was at the



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time of the acts described below occupying and practicing dentistry in his dental offices at 2506 Ponce de Leon Boulevard, Coral Gables, Dade County, Florida and/or 5801 East Bird Road, Miami, Dade County, Florida, and his professional address listed with the Board office is 5801 East Bird Road, Miami, Dade County, Florida.

3. That the said Dr. John F. Cooper has violated the provisions of Chapter 466 of the Florida Statutes as follows:

(a) That the said Dr. John F. Cooper, at his dental offices located at 2506 Ponce de Leon Boulevard, Coral Gables, Dade County, Florida and/or 5801 East Bird Road, Miami, Dade County, Florida, on or about for a period from May of 1969 to May of 1971, did have as his employee one Dina Leopardi, and due to the inability of the said Dr. John F. Cooper to manage his personal and business affairs, it was necessary for the said Dina Leopardi to take charge of his entire finances for his said dental offices and to open bank

accounts for the said Dr. John F. Cooper's dental practice in her name, to wit: Dina Leopardi, and for her to take the cash receipts home every day to prevent the said Dr. John F. Cooper from spending said money and not being able to properly cover checks drawn on old checking accounts that had been closed and otherwise that the said Dr. John F. Cooper would write and cash "bad checks" and otherwise was unable to properly perform the necessary and proper business functions of his office due primarily to his habitual and excessive use of intoxicants and/or drugs, said acts being in violation of Florida Statutes Chapter 466, and in particular Section 466.24 (3) (a) (d) (n) Florida Statutes, but not limited thereto.

(b) That the said Dr. John F. Cooper, at his dental offices located at 2506 Ponce de Leon Boulevard, Coral Gables, Dade County, Florida and/or 5801 East Bird Road, Miami, Dade County, Florida, on or about for a period from May of 1969 to May of 1971, did use drugs and pills

all day long in his dental offices such as Tuinals, Seconals and Dexedrine. That the said Dr. John F. Cooper did write prescriptions in the names of people not his patients or for whom he was performing no dental services and would have said prescriptions filled for his private use and would consume the said drugs. The said Dr. John F. Cooper used the name, among others (see charges below), Dina Leopardi, and did on the following dates issue and use prescriptions for the following drugs, using the name Dina Leopardi, when the said Dr. John F. Cooper knew that he was not writing the prescriptions for Dina Leopardi and that in fact he consumed the drugs himself:

4/22/70	Ananase, No. 12, 100 mg.
5/21/70	Dexamyl, No. 10, 10 mg.
6/30/70	Empirin #3, No. 10
11/11/70	Dexamyl, No. 5, 5 mg.

said acts being in violation of Florida Statutes Chapter 466, and in particular Section 466.24 (1), (3) (a) (c) (d) (n), Florida Statutes, but not limited thereto.

(c) That the said Dr. John F.

Cooper, at his dental offices located at 2506 Pnce de Leon Boulevard, Coral Gables, Dade County, Florida and/or 5801 East Bird Road, Miami, Dade County, Florida, on or about for a period from May of 1969 to May of 1971, did drink intoxicating beverages at his said offices all most (sic) every day and that from December of 1970 and from February through April of 1971 did habitually use intoxicants and drugs to the extent that he could not perform any dental services and that he did cancel out his dental schedule two or three days a week during said period of time in a row and did regularly cancel out his dental schedule at least every other day during said period because of said condition, said acts being in violation of Florida Statutes Chapter 466, and in particular Section 466.24 (1), (3) (a) (c) (d) (n), Florida Statutes, but not limited thereto.

(d) That the said Dr. John F. Cooper, at his dental offices located at 2506 Ponce de Leon Boulevard, Coral Gables, Dade

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County, Florida and/or 5801 East Bird Road, Miami, Dade County, Florida, during a period from May of 1969 to May of 1971 and particularly during the early part of 1971 to and through April of 1971, did live at his said offices and that he did use intoxicants and/or drugs to the extent that he would become intoxicated or in a stupor and that his office personnel, to-wit: Dina Leopardi and/or Linda Vega and/or his cleaning woman or patients would find him in a "completely passed out condition, and being without his normal faculties, and that the floor and/or bed where he would be lying would be in a very unsanitary and filthy condition because of food, urine and other human waste products being in and about said office", said acts being in violation of Florida Statutes Chapter 466 and in particular Section 466.24 (1), (3) (a) (c) (d) (1) (n), Florida Statutes, but not limited thereto.

(3) That the said Dr. John F. Cooper, at his dental offices located at 2506

Ponce de Leon Boulevard, Coral Gables, Dade County, Florida and/or 5801 East Bird Road, Miami, Dade County, Florida, during the period from May of 1969 to May of 1971, did become intoxicated on alcohol or drugs to the extent that he would either go into a stupor and talk incoherently to his patients seated in his dental chair and would exhibit his intoxicated condition to his said patients while performing dental services, including anesthetizing them. At said times, Dr. John F. Cooper would shake so badly that he could hardly talk, or in the alternative, he would talk incessantly. All of said acts being done in his office while his office personnel was present and/or patients, said acts being in violation of Florida Statutes Chapter 466, and in particular Section 466.24 (1), (3) (a) (c) (d) (n), Florida Statutes, but not limited thereto.

(f) That the said Dr. John F. Cooper, at his dental offices located at 2506 Ponce de Leon Boulevard, Coral Gables, Dade County,

Florida and/or 5801 East Bird Road, Miami, Dade County, Florida, did use on prescriptions the name of Lois Vaughn to obtain narcotics and drugs during 1970 and the first three months of 1971, including Tuinal and Dexedrine, and in particular, did on January 23, 1971, prepare and sign a prescription in the name of Mrs. Lois Vaughn for Tuinal and did have said prescription filled for his private use and did use said drug, well knowing that the said drug was to be used by him for his use and not for the said Lois Vaughn, and further that the said Lois Vaughn was not a patient of the said Dr. Cooper, said acts being in violation of Florida Statutes Chapter 466, and in particular Section 466.24 (1), (3) (a) (c) (d) (n), Florida Statutes, but not limited thereto.

(g) That the said Dr. John F. Cooper, at his dental offices located at 2506 Ponce de Leon Boulevard, Coral Gables, Dade County, Florida and/or 5801 East Bird Road, Miami, Dade County, Florida, was an alcoholic during 1970

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and in 1971, and that he, because of the habitual use of intoxicants and/or drugs could not function or work in his dental offices during said period of time, and that he further would habitually frequent bars, fight and be forcefully ejected or "thrown out of bars" in and about the area which he lived and worked, said acts being in violation of Florida Statutes Chapter 466, and in particular Section 466.24 (1), (3) (a) (n), Florida Statutes, but not limited thereto.

(h) That the said Dr. John F. Cooper at his dental offices located at 2506 Ponce de Leon Boulevard, Coral Gables, Dade County, Florida and/or 5801 East Bird Road, Miami, Dade County, Florida, did prescribe and issue prescriptions for a drug or narcotic call (sic) Librium to the said Lois Vaughn when the said Lois Vaughn was not a dental patient of the said Dr. John F. Cooper and said drug could not be properly dispensed by the said Dr. John F. Cooper to the said Lois Vaughn for her use or for the use of the said Dr.

John F. Cooper, said acts being in violation of Florida Statutes Chapter 466, and in particular Section 466.24 (1), (3) (a) (c) (d) (n), Florida Statutes, but not limited thereto.

(i) That the said Dr. John F. Cooper, at his dental offices located at 2506 Ponce de Leon Boulevard, Coral Gables, Dade County, Florida and/or 5801 East Bird Road, Miami, Dade County, Florida, did use the name Patrick Robinson to obtain narcotics and drugs for himself during 1970 and the first two months of 1971, including Seconal and Tuinal, and did prepare and sign prescriptions in the name of the said Patrick Robinson and did have said prescriptions filled for his private use and did use said drugs well knowing that the said drugs were to be used by him for his use and not the said Patrick Robinson, and further that the said Patrick Robinson was not a patient of the said Dr. John F. Cooper. Said dates and drugs are as follows:

3/17/70 Seconal 12/21/70 Tuinal

4/1/70	Seconal	1/2/71	Tuinal
4/25/70	Seconal	1/8/71	Tuinal
6/9/70	Seconal	1/16/71	Tuinal
7/6/70	Tuinal	1/23/71	Tuinal
10/23/70	Tuinal	1/23/71	Doridan
11/11/70	Tuinal	1/27/71	Ananase
11/21/70	Tuinal	2/8/71	Tuinal
12/4/70	Tuinal	2/22/71	Tuinal
12/15/70	Tuinal		

said acts being in violation of Florida Statutes Chapter 466, and in particular Section 466.24 (1), (3) (a) (c) (d) (n), Florida Statutes, but not limited thereto.

(j) That the said Dr. John F. Cooper, at his dental offices located at 2506 Ponce de Leon Boulevard, Coral Gables, Dade County, Florida and/or 5801 East Bird Road, Miami, Dade County, Florida, did prepare and sign and give to one Art McKeehan on or about May 31, 1971, a prescription for a narcotic, to-wit: Ananose, when in fact the said Art McKeehan was not a patient of the said Dr. John F. Cooper, and the said Dr. John F. Cooper did further prepare, sign and give to one Mrs. Ann McKeehan prescriptions for narcotics, when in fact the said Mrs. Ann McKeehan was not a patient of the said Dr. John F. Cooper, said dates

and drugs are as follows:

8/22/70	Dexamyl	11/13/70	Dexamyl
10/27/70	Dexamyl	1/20/71	Tuinal

said acts being in violation of Florida Statutes Chapter 466, and in particular Section 466.24 (3) (a) (c) (d) (n), Florida Statutes, but not limited thereto.

(k) The said Dr. John F. Cooper, while engaged in the practice of dentistry in the State of Florida, was arrested for "disorderly person by intoxication", by the Coral Gables City Police Department on the following dates:

August 22, 1963	September 23, 1970
August 26, 1963	November 20, 1970
February 13, 1965	December 12, 1970
February 1, 1970	February 28, 1971

and had further been arrested by the City of Miami Police Department on May 5, 1963 for "Aggravated Assault (on complaint)", and further for "public drunkeness" on the following dates:

April 30, 1965	January 19, 1966
July 19, 1965	September 22, 1967
October 13, 1965	October 10, 1967
January 13, 1966	

and due to driving while intoxicated had lost his

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drivers license, said acts being in violation of Florida Statutes Chapter 466, and in particular Section 466.24 (1), (3) (a) (n), Florida Statutes, but not limited thereto.

4. The above described acts, all of which violate Chapter 466 of the Florida Statutes, are in violation of Section 466.24 (1), (3) (a) (c) (d) (1) (n), of the Florida Statutes, but not limited thereto.

Robert M. Denton, D. D. S.

ROBERT M. DENTON, D.D.S.
Executive Director and Assistant
Secretary-Treasurer of the Florida
State Board of Dentistry

STATE OF FLORIDA)
: ss
COUNTY OF DUVAL)

Personally appeared before me Robert M. Denton, D.D.S., Executive Director and Assistant Secretary-treasurer of the Florida State Board of Dentistry, who being first duly sworn, says that the allegations set forth in the within

Accusation are based upon facts and information supplied to the Florida State Board of Dentistry and said facts, if true, would constitute the offense therein charged and a violation of Chapter 466, Florida Statutes.

Robert M. Denton, D.D.S.

ROBERT M. DENTON, D.D.S.
Executive Director and Assistant
Secretary-Treasurer of the Florida
State Board of Dentistry.

Sworn to and subscribed before
me this 9th day of December, 1971.

Phyllis J. Frank

Notary Public, State of Florida
My commission expires:
Notary Public State of Florida at Large
My commission expires Dec. 22, 1973
Bonded thru Fred W. Diestelhorst

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FILED
JAN 22 1973
MICHAEL RODAK, JR., CLERK

In The
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-774
and
No. 72-866

DR. JOHN F. COOPER,

Petitioner

vs.

THE FLORIDA STATE BOARD OF DENTISTRY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

Richard L. Randle
1604 American Heritage Life Bldg.
Jacksonville, Florida 32202

Attorney for Respondent

SLATER AND RANDLE
1604 American Heritage Life Building
Jacksonville, Florida 32202

Of Counsel

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In The Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-774
and
No. 72-866

DR. JOHN F. COOPER,

Petitioner

vs.

THE FLORIDA STATE BOARD OF DENTISTRY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

INTRODUCTION

The Respondent, The Florida State Board of Dentistry, in this Brief is making a common response to the Petitions For Writ of Certiorari filed with this Court by the Petitioner, Dr. John F. Cooper, being Case Numbers 72-774 and 72-866.

It is respectfully shown that the Petitions are identical with the exception of a reference to a report of the Board of Trus-

tees of the American Medical Association, which was in no way a part of the proceedings below.

QUESTIONS PRESENTED

Respondent, The Florida State Board of Dentistry, is not satisfied with Petitioner's Federal Questions Presented for review or with the argumentative and factually unsupported manner in which the questions are framed, and would prefer to state the questions presented as follows:

1. Under the laws of the State of Florida, can the public be protected from a dentist because he is a habitual user of intoxicants and drugs rendering him unfit for the practice of dentistry and has been guilty of malpractice, willful negligence in the practice of dentistry, misconduct in his business and personal affairs which would bring discredit upon the dental profession, and for failure to provide sanitary facilities and conditions?

2. Is Florida permitted, through the Legislature and under the police powers, to provide for qualifications and to prohibit certain clearly set forth conduct to protect the health, safety and welfare of the people of the State of Florida?

3. Can a dentist, a habitual user of intoxicants and drugs which impairs his ability to practice dentistry, be subject to having his license revoked to protect the citizens of the State of Florida from such dentist?

4. Is the accused in an administrative hearing afforded due process of law when he is given proper and appropriate notice under the Statutes, has counsel, subpoenas witnesses, makes a judicial attack upon the Board's proceedings prior to the hearing, which the Circuit Court (of Florida) denied,

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attends the hearing represented by counsel and presents twenty-seven witnesses in the accused's case, has a full review of all matters prior to the hearing and at the hearing, is given full opportunity to be heard, and, subsequent to the hearing, a complete review by a Florida Appellate Court and a further review by the Supreme Court of Florida?

It is respectfully submitted that these questions can all be answered in the affirmative.

STATEMENT OF THE CASE

Respondent believes that a more orderly and accurate statement of the case can be and should be presented to this Court, rather than disjunctive, confusing and illogically placed statements made to this Court by the Petitioner. We respectively submit what we believe to be a more chronological and factual presentation of the statement and history of the case.

Respondent, The Florida State Board of Dentistry, is a regulatory agency established by the Legislature of the State of Florida (Chapter 466 of the Florida Statutes) for the purpose of inter alia of conducting hearings on proceedings to revoke or suspend a license when evidence has been presented showing violations of the aforesaid statute.

The Petitioner, Dr. John F. Cooper, was a licensed dentist authorized to practice dentistry in the State of Florida prior to the revocation of his license by the Respondent Board.

Respondent conducted a hearing on the Accusation dated December 9, 1971, and without going into the details of the Accusation, which was in minute detail, the Petitioner was accused under Florida Statutes 466.24 of being a habitual

user of intoxicants and drugs rendering him unfit for the practice of dentistry, of being guilty of misconduct in his business or personal affairs which would bring discredit upon the dental profession, malpractice and willful negligence in the practice of dentistry.

The charges stemmed from the excessive and habitual use of intoxicants and drugs by the Petitioner for a period from 1963 to just before the Accusation was filed. The Petitioner drank intoxicating beverages at his dental office for a number of years immediately preceding the Accusation to such an extent that he could not perform dental services in his office or maintain any schedule of dental appointments, and would use intoxicants and drugs to the extent that he would pass out and be without the use of his normal faculties and would lie in an unsanitary and filthy condition during these periods of time.

The Petitioner issued prescriptions using the names of many individuals for whom the prescriptions were never intended and knowing full well that the issuance of the prescriptions for the drugs were to be used, not for the individual in whose name they were issued, but for himself, he would issue the prescriptions and take the drugs.

The Petitioner, while engaged in the practice of dentistry, as alleged in the Accusation, became so intoxicated and disorderly that it resulted in his arrest, and further for aggravated assault or public drunkenness approximately fifteen times from 1963 to 1971.

During this period of time, the privilege of driving an automobile was taken from the Petitioner because of his driving while intoxicated and his entering a plea of guilty to drunken driving.

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The Petitioner was unable to perform and manage his business and personal affairs, including, but not limited to, his entire financial affairs of his dental office, his bank accounts, including the fact that it was necessary for his bank accounts to be maintained in the name of his secretary, and that he issued and cashed worthless (bad) checks.

A Notice of Hearing, together with the Accusation, was served upon the Petitioner in accordance with Florida Statutes.

Petitioner made certain motions, together with a Motion For Continuance, which was couched in general terms and was acted upon immediately by the Board. At the same time, a Motion For Bill Of Particulars, a Motion For List Of Witnesses, and a Motion To Dismiss were filed, all of which were promptly acted upon by the Board. In addition thereto, Petitioner's counsel was in constant contact with the Board's attorney and was advised on procedures and the Board cooperated fully with the Petitioner and his counsel on all matters required for said hearing.

The Board received a request from the Petitioner for twenty-eight witness subpoenas, all of which were hastily dispatched and served on the witnesses, with the Petitioner producing twenty-seven witnesses at the hearing, and any witness not so produced, a stipulation was entered into that information submitted by that witness was received into evidence on behalf of the Petitioner.

The Petitioner made no request for or noticed any depositions and received the full cooperation of the Board and its counsel in preparing for the hearing.

Immediately prior to the said hearing, on January 14 and

15, 1972, Petitioner filed an Application for Declaratory Judgment and a Motion For Temporary Injunction in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, urging the same points that he urged before the Florida Appellate Courts. After a full and complete hearing on the Application for Declaratory Judgment and Motion For Temporary Injunction, the Application was denied and the Motion dismissed. The Petitioner did not appeal the ruling of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, wherein the Circuit Judge ruling on Petitioner's Application and Motion commented succinctly that the Accusation was as detailed, clear, exacting and informative as any administrative charge he had ever seen.

The Petitioner entered a plea of guilty to certain charges and took the witness stand and admitted what he stated were his indiscretions (actually the charges), either in whole or in part.

At no point in the proceedings did the Petitioner ever attempt to produce any physician, either by subpoeaning him, by deposition, or by a written report or otherwise regarding any evidence concerning Petitioner's condition.

After the full and fair hearing, the Board made its determination of fact based upon competent, substantial evidence as found by the reviewing courts.

Petitioner filed a Petition For Writ of Certiorari with the District Court of Appeal of Florida, Third District, and after review and argument before the said court, the said District Court of Appeal of Florida, Third District, denied Petitioner's Petition For Writ of Certiorari and also denied Petitioner's Petition For Rehearing.

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Whereupon the Petitioner sought both by way of appeal and by certiorari a review of this case by the Supreme Court of Florida, and after filing briefs and hearing oral argument, the Supreme Court of Florida dismissed the appeal and denied the Petition For Certiorari.

Whereupon the Petitioner filed his Petition For Writ of Certiorari to this Court, both from the Third District Court of Appeal of Florida and from the Supreme Court of Florida. Said Petitions being the same with the exception of a reference to a report of the Board of Trustees of the American Medical Association, which was in no way a part of the proceedings below.

A common response is being made herein to said Petitions.

ARGUMENT

Respondent would respectfully submit to this Court that it is difficult to submit an appropriate and logically oriented brief if the Respondent attempts to answer the Petitioner's Petitions using the outline form and procedure adopted by the Petitioner.

Although the Petitioner purportedly begins his Argument on page 45 of his Petitions, much of the preceding pages submitted by the Petitioner are argumentative and factually unsupported and would indeed be difficult to answer line by line and this Brief not become as confusing, disjunctive and rambling as Petitioner's Petitions.

1. IS A STATE STATUTE, WHICH IS PENAL IN NATURE DEALING WITH THE REVOCATION OF A DENTIST'S LICENSE, REPUGNANT TO THE

DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES IF SAID STATUTE: (1) IS SO VAGUE, INDEFINITE AND STANDARDLESS AS TO FAIL TO GIVE MEN OF COMMON INTELLIGENCE FAIR NOTICE OF WHAT IT FORBIDS? (2) FURTHER, CAUSES MEN TO NECESSARILY GUESS AT ITS MEANING AND DIFFER AS TO ITS APPLICATION?

As Restated by Respondent:

UNDER THE LAWS OF THE STATE OF FLORIDA, CAN THE PUBLIC BE PROTECTED FROM A DENTIST BECAUSE HE IS A HABITUAL USER OF INTOXICANTS AND DRUGS RENDERING HIM UNFIT FOR THE PRACTICE OF DENTISTRY AND HAS BEEN GUILTY OF MALPRACTICE, WILLFUL NEGLIGENCE IN THE PRACTICE OF DENTISTRY, MISCONDUCT IN HIS BUSINESS AND PERSONAL AFFAIRS WHICH WOULD BRING DISCREDIT UPON THE DENTAL PROFESSION, AND FOR FAILURE TO PROVIDE SANITARY FACILITIES AND CONDITIONS?

The Florida State Board of Dentistry is a Board created by the Legislature of the State of Florida with its responsibility under the police powers to protect the health, safety and welfare of the people of the State of Florida as set forth in Section 466.01 of the Florida Statutes.

> "466.01 Objects and purposes of chapter.—The practice of dentistry in the state is hereby declared to affect the public health, safety and welfare and to be subject to regulation and control in the public in-

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> terest. It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and that only qualified dentists be permitted to practice dentistry in the state. All provisions of this chapter relating to the practice of dentistry and dental hygiene and to the registration of dental laboratories shall be liberally construed to carry out these objects and purposes."

It has long been recognized in the United States and the States of the United States that the Legislature of the various States may prescribe qualifications and requirements for the privilege of practicing a profession in that State. It is likewise the very foundation of the law as applies to Administrative Boards that they may act through appropriate legislation to protect the health, safety and welfare of the people of a State from a professional man that would violate the qualifications and requirements of fitness as set forth by the Legislature.

The case of *Smith* v. *Texas*, 233 U.S. 630 (1913), which case is cited by the Petitioner, is authority from this Court that if the service is public (which the practice of dentistry is), the State may prescribe qualifications and require examinations to test the fitness of persons to engage in or remain in the public calling. This Court says:

> "If the service is public, the state may prescribe qualifications and require an examination to test the fitness of any person to engage in or remain in the public calling. Re Lockwood, 154 U.S. 116, 38 L.Ed. 929, 14 Sup.Ct.Rep. 1082; Hawker v. New York, 170 U.S. 189, 42 L.Ed. 1002, 18 Sup.Ct.Rep. 573; Watson v. Maryland, 218 U.S. 173, 54 L.Ed. 987, 30 Sup.Ct.Rep. 644."

And this Court further said:

> ". . . This and the other cases establish, beyond controversy, that, in the exercise of the police power, the state may prescribe tests and require a license from those who wish to engage in or *remain* in a private calling affecting the public safety . . . ."
> (Emphasis is Supplied)

Petitioner attempts to make the argument that Chapter 466.24 is vague, indefinite and standardless. It is hard to conceive of such a statement being made, when the Petitioner sets forth in his Petitions on pages 10, 11, 12 and 13 the rather exacting provisions as to when a dentist's license might be subject to suspension or revocation for a violation of said section or parts thereof.

Petitioner in his Petitions attempts at one point to break down into small segments Section 466.24 and then to erroneously and ridiculously guess at what these tiny segments mean, when if each segment is read as a section, it is abundantly clear what is meant by the law. He wishes to enter into the field of surmise and conjecture and to make up facts and circumstances, none of which are a part of this case, rather than to look at the clear and concise language of the Statutes and to the Accusation wherein the Petitioner was charged with particular sections of Chapter 466.24.

Petitioner has used the same argument throughout the courts of the vagueness of the Statutes and the vagueness of the Accusation. The Circuit Court Judge for the Eleventh Judicial Circuit, in and for Dade County, Florida, succinctly summed up the matter when he denied Petitioner's Application for Declaratory Judgment and Motion For Temporary Injunction and stated that the law and the Accusation could not be more detailed or emphatic or any clearer.

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Petitioner has used the statement the law is drafted to mean different things to a man of common intelligence, yet many pages of his Petitions and his Argument are not the thoughts of a man of common intelligence, but more the ramblings of someone who is attempting to be obviously ridiculous.

Petitioner is obviously ignoring the clear language of the Accusation and the clear unequivocal language of the Statutes.

Section 466.24(1) of the Florida Statutes states:

> "466.24 Suspension or revocation of license certificate for cause.—The board shall suspend or revoke the license of any dentist or dental hygienist when it is established to its satisfaction that he:
>
> (1) Is a habitual user of intoxicants, or drugs or is afflicted with physical disability, senility, psychiatric disorders or other disease deemed dangerous to the public health, thus rendering him unfit for the practice of dentistry or dental hygiene."

What could be more clear than the need to protect the health, safety and welfare of the people of the State of Florida from a dentist who is a habitual user of intoxicants and drugs, the use of which renders him unfit for the practice of dentistry. The competent, substantial evidence, which was presented to the Board and which has been reviewed by the Florida Courts, clearly showed that the Petitioner was unfit to practice dentistry by the use of intoxicants and drugs and was incapable of maintaining a dental office. Serious and permanent injury could befall a patient of the Petitioner because of Petitioner's inability to perform in his office because of his use of intoxicants and drugs.

Petitioner, in his Petitions, continues to misquote the clear intent of the law when he states that persons with physical disabilities rendering them unfit for the practice of dentistry would not be in violation of the law. The Statute is clear that if a person is rendered unfit for the practice of dentistry because of physical disability, such person is subject to having his license suspended or revoked because of such physical disability.

The Petitioner, in several portions in his Petitions referring to the vagueness of the Statutes, asks the question, what is malpractice. Malpractice is subject to a definition, but what constitutes malpractice would be determined from the acts and conduct of the individual dentist.

The leading annotated case of *Jiro Yoshizawa v. Harry R. Hewitt*, 79 A.L.R. 317, 52 F.2d 411, holds that a Statute providing for revocation of a physician's license for "gross carelessness" is not too vague and that a Statute providing that the license of a physician may be revoked by the officers or board by which such licenses are granted is not rendered uncertain or otherwise invalid because the grounds for revocation are stated in general terms. The Court in the annotated case said:

> "In making 'gross carelessness' one of the grounds for revocation of a license it is clear that the statute did not go beyond the constitutional powers of the Legislature. The phrase is synonymous with 'gross negligence,' and the latter phrase has a well-understood meaning built up in innumerable cases arising in all branches of the law, as well as in many cases involving the relations of physicians and their patients.
>
> 'Gross negligence' is that entire want of care which would raise a presumption of conscious indifference

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to consequences; an entire want of care, or such a slight degree of care as to raise the presumption of entire disregard for, and indifference to, the safety and welfare of others; the want of even slight care or diligence. Foster v. State [102 Tex. Cr. R. 602] 279 S. W. 270; L. & N. Ry. Co. v. Smith [135 Ky. 462] 122 S. W. 806; Strong v. Western Union Telegraph Co. [18 Idaho, 389] 109 P. 910 [30 L.R.A. (N.S. 409, Ann. Cas. 1912A, 55]; Words and Phrases, Third Series, 'Gross Negligence.''

'In the absence of any statute the common law holds every physician and surgeon answerable for an injury to his patient resulting from want of the requisite knowledge and skill, or the omission to use reasonable care and diligence, or the failure to exercise his best judgment.' 21 R. C. L. 26, p. 379.

In view of the established meaning of the term under the common law, as interpreted in a long line of cases, it cannot be successfully maintained that 'gross carelessness' is too vague an expression, or that the charge filed against the defendant-appellant did not give him notice of the nature of the allegation which he was called upon to defend.

The term 'gross carelessness' has an ascertainable meaning to the medical profession as well as to laymen. In the instant case the 'gross carelessness' and 'manifest incapacity' were alleged to have been shown in treating a patient 'for suspected threatened abortion.'

The phrase 'manifest incapacity,' however, stands in a different light from that just treated. The phrase is not defined by the common law; we have been unable to find a judicial interpretation of the phrase as

an entity either in cases in general or in those dealing with physicians particularly; there is nothing in the instant statute that attempts to define the term. The phrase must, then, be interpreted.

In Re Hermance v. Supervisors of Ulster County, 71 N. Y. 481, it was said: Something manifest is 'something which is apparent by an examination . . . needing no evidence to make it more clear. That which is open, palpable, and, I might add, uncontrovertible.' In Travelers' Insurance Co. v. Richmond (Tex. Com. App.) 291 S. W. 1085, 1087, it was said that 'incapacity' used without qualifying words means 'inefficiency,' 'incompetency,' and 'lack of adequate power.' Manifest incapacity, then, in the sense of the statute means a lack of power to comprehend or to act, such lack being so obvious that no proof is necessary to establish it, other than proof of the act itself.

The board of health of Hawaii has seven members, of whom two are physicians. Their decision as to any particular case would be opinion, but opinion in the sense that a jury's verdict is opinion. One can never escape the fact that the judgment of administrative boards must, in the last analysis, be opinion, but in the case of a board in which there are professional men, an opinion fortified with judgment and experience.

In this connection, we may state in passing that section 15 of the Revised Laws of Hawaii 1925 provides: "Each of the terms 'or' and 'and' has the meaning of the other or of both, where the subject matter, sense and connection require such construction."

Accordingly, it might be argued that proof of acts of *either* 'gross carelessness' *or* 'manifest incapacity'

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might be sufficient to support a revocation of a physician's license. We are not basing our decision, however, upon this ground.

Nor are we relying upon the form of license set forth in section 1027, which provides: 'This license is granted and accepted on the express condition that it may be revoked at any time for professional misconduct, gross carelessness or manifest incapacity; such misconduct, carelessness or incapacity, having been proven to the satisfaction of the board of health, and by the body reported to the treasurer.'

We desire to point out, however, that this provision in the license was impliedly agreed to by the appellant when he accepted the license. It will also be noticed that the conjunction used in the license is 'or' and not 'and,' as in section 1029.

The criterion to be applied to statutes of the nature of the one in question is thus stated in 5 A.L.R. page 94: 'The rule obtaining in the majority of the jurisdictions which have passed on the question is that a statute providing that the license of a physician, surgeon, or dentist may be revoked by the officers or board by which such licenses are granted, is not rendered uncertain or otherwise invalid because the grounds for revocation are therein stated in general terms.'

In Ruling Case Law, vol. 21, pp. 365-367, we find the following language: 'The universal custom among the states requiring a license of physicians and surgeons is to vest in a medical board the power of examining applicants and determining their fitness to practice. There has been a good deal of litigation involving the validity of such delegation, but almost

always with the result that the delegation was held to be valid. True, such boards are ministerial in their nature, but a full discharge of their duties often necessitates the consideration and determination of questions legal in their nature. However, due process is not necessarily judicial process, and such delegation violates no province of the federal constitution, or of the general laws . . ."

The Court went on to say and quoted from this Court as follows:

"In Bradley v. Richmond, 227 U. S. 477, 482, 33 S. Ct. 319, 57 L. ed. 603, the court said: 'Neither do we see any reason under the 14th Amendment why the state may not delegate to either the council of the city or to a board appointed for that purpose the power to divide such occupations or privileges into classes or subclasses, and prescribes the tax to be paid by the members of each such class. Gundling v. Chicago, 177 U. S. 183, 20 S. Ct. 633, 44 L. ed. 725; Fischer v. St. Louis, 194 U. S. 361, 372, 24 S. Ct. 673, 48 L. ed. 1018, 1024; Lieberman v. Van De Carr, 199 U. S. 552, 560, 26 S. Ct. 144, 50 L. ed. 305, 310. In the case last cited, this court said: 'That this court will not interfere because the states have seen fit to give administrative discretion to local boards to grant or withhold licenses or permits to carry on trades or occupations, or perform acts which are properly the subject of regulation in the exercise of the reserved power of the states to protect the health and safety of its people, there can be no doubt.'

Again, in the case of Douglas v. Noble, 261 U. S. 165, 169, 170, 43 S. Ct. 303, 305, 67 L. ed. 590, we

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find the following language, used by Mr. Justice Brandeis: 'The Legislature itself may make this finding of the facts of general application, and by embodying it in the statute make it law. When it does so, the function of the examination board is limited to determining whether the applicant complies with the requirements so declared. But the Legislature need not make this general finding. To determine the subjects of which one must have knowledge in order to be fit to practice dentistry, the extent of knowledge in each subject, the degree of skill requisite, and the procedure to be followed in conducting the examination — these are matters appropriately committed to an administrative board. Mutual Film Corporation v. Ohio Industrial Commission, 236 U. S. 230, 245, 246, 35 S. Ct. 387, 59 L. ed. 552, Ann. Cas. 1916C, 296. And a Legislature may, consistently with the federal Constitution, delegate to such board the function of determining these things, as well as the functions of determining whether the applicant complies with the detailed standard of fitness. Reetz v. Michigan, 188 U. S. 505, 23 S. Ct. 390, 47 L. ed. 563."

This Court in the case of *Lee Optical of Oklahoma vs Williamson*, 348 U.S. 483, 99 L.Ed. 563, 75 S.Ct. 461, cited in the case of *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 10 L.Ed.2d 983, 83 S.Ct. 1759, involved an Oklahoma Statute dealing with the regulation of visual care and was upheld against claims of unconstitutionality by the Supreme Court of the United States in toto by all members of the Court, 8 in number, which heard the case. Mr. Justice Douglas, speaking for the Court and delivering the opinion states that the day is gone when this Court uses the due process clause of the 14th Amendment to strike down

state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. For protection against abuses by legislatures the people must resort to the polls, not to the courts.

In the case of *Mack v. Pepper*, 192 So.2d 66, Cert. denied by Fla.Sup.Ct. 430 F.2d 862, Cert. denied by the U.S.Sup.Ct. 28 L.Ed 2d 237, the Florida District Court of Appeal, Third District, said:

> "Petitioner, Roy F. Mack, seeks review, by writ of certiorari, of an order of the Florida State Board of Dental Examiners which revoked his license to practice dentistry. The Board found the petitioner guilty of three separate charges; they are: (1) he caused to be listed in the yellow pages of the Greater Miami Telephone Directory a listing for Palm Springs General Hospital with his private number; (2) he advertised professional services at a greatly reduced cost to certain members of trade unions; (3) misconduct in his business which would bring discredit upon the dental profession."
>
> "In his brief, petitioner has presented two points. The first point urges that the procedure before the Dental Board was such that he was deprived of a fair and impartial trial. The second point urges that the Board's findings are not supported by substantial competent evidence. We have reviewed the record in the light of these charges, and we find that the first point is without merit. See State ex rel. iWlliams v. Whitman, 116 Fla. 196, 150 So. 136, 156 So. 705, 95 A.L.R. 1416 (1934); Florida Board of Pharmacy v. Levin, Fla. 1966, 192 So.2d 14 (filed October 12, 1966). The second point is also without merit. A review of the record

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reveals evidence to support the finding of the Board under the rules laid down in DeGroot v. Sheffield, Fla. 1957, 95 So.2d 912 and Florida State Board of Dental Examiners v. Feinglass, Fla.App. 1964, 166 So.2d 686."

"We find particularly apropos to the review of this record the opinion in Florida Board of Pharmacy v. Levin, supra, wherein the Supreme Court set forth a caution upon the review of orders of State professional boards. The Court stated:

> 'It is true some odium attaches to the method employed by some licensing boards in apprehending violators through the use of agents who make purchases and procure deliveries to themselves of unprescribed or restricted items. Nevertheless, due to the difficulties involved in regulating certain professions, such procedures have been found to be necessary and appropriate to properly administer the regulatory laws in the interest of the health and welfare of the general public. See Mitchell v. Gillespie, Fla.App., 164 So.2d 867, affirmed Fla., 172 So.2d 819; Florida Board of Pharmacy v. Hall, Fla.App., 157 So.2d 824; and Carter v. State, Fla., 155 So.2d 787.
>
> 'It is apparent that because of the particular issues in the hearing, the members of the Board of Pharmacy, who are all pharmacists (see Sec. 465.041, F.S.A.), were in all probability better qualified than others not members of the profession, to determine whether their fellow-professional Levin's action and conduct in the premises measured up to the recognized standards

and regulations of the pharmaceutical profession.'"

It is respectfully submitted that Chapter 466.24 of the Florida Statutes is indeed clear and subject to definition, and the terms used therein have definite legal meaning and that Petitioner's contention concerning vagueness is without merit and has been held to be without merit by all the courts reviewing this matter.

Petitioner's citation of cases dealing with vagrancy ordinances are without merit and in no way material to the instant case. Neither are Petitioner's citations to cases involving requirements of oaths of loyalty or otherwise in any way involved in this case.

In a Florida case previously cited by the Petitioner it is believed that the language contained therein appropriately sums up the Respondent's position. Petitioner's previous citation of *Varholy v. Sweat*, 15 So. 2d 267, 153 Fla. 571, holds the following proposition:

> "Generally, rules necessary to protect the public health are legislative questions, and appropriate methods intended to accomplish these ends will not be disturbed by the courts."
>
> "All reasonable presumptions should be indulged in favor of the validity of the action of the Legislature and the duly constituted health authorities to protect the public health, but the constitutional guaranties of personal liberty and private property cannot be arbitrarily invaded."
>
> "Enactment and enforcement of necessary and appropriate health laws and regulations is a legitimate exer-

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cise of the 'police power' which is inherent in the state and which it cannot surrender."

"The constitutional guaranties of life, liberty, and property of which one may not be deprived without due process of law do not limit the exercise of the police power of the state to preserve the public health so long as that power is reasonably and fairly exercised and not abused."

"Every reasonable presumption must be indulged in favor of the validity of legislative action in exercise of the police power to preserve the public health, and in favor of the validity of regulations and actions of health authorities."

Although the Petitioner may want to argue that the use of the term "reasonably and fairly exercised" is vague and ambiguous, to restrict the use of these words in the law would be borderline on, if not, ridiculous.

The Petitioner, in his Petition for Certiorari to this Court from the District Court of Appeal of Florida, Third District, on page 51 thereof, makes reference to a report of the Board of Trustees of the American Medical Association. Although this report was not in any way a part of the hearing or review below, it is interesting to note that the article supports the position of the Board and the Courts of the State of Florida when this report says:

"*Apart* from the cases of alcohol and drug dependence which came before disciplinary bodies with relatively high frequency, there are, as in the general population, other less visible diagnostic entities of mental disorders occurring with, perhaps, greater frequency among physicians . . . ." (Emphasis supplied)

This report recognizes the cases wherein physicians became alcoholics or drug addicts and necessarily came before disciplinary bodies, and then discusses other less visible diagnostic entities of mental disorders. The report goes on to say:

> "The psychotic reactions, without question, impair the ill physician's judgment and ability to practice, and a psychoneurosis or a personality disorder of sufficient degree can constitute a similar risk to the safety of the patient."

Therefore, by the very report which is actually irrelevant and immaterial, it is recognizable that "mental disorders" can constitute *a similar* risk to the safety of the patient. The report recognizes the risk to the safety of a patient from a doctor that is an alcoholic or a drug addict.

The Board, in revoking the license of the Petitioner (which by administrative proceedings under the Florida Dental Practice Act he can petition to have restored), the Respondent is not confining or punishing the doctor, but is protecting the health, safety and welfare of the people of the State of Florida in accordance with the valid and clear Florida law.

2. IS A STATE STATUTE WHICH IS USED IN PERFORMING A VALID GOVERNMENTAL FUNCTION UNCONSTITUTIONAL FOR BEING REPUGNANT TO THE RIGHT OF PRIVACY PROVISION OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IF SAID STATUTE: (1) BY ITS OVERBREADTH ALLOWS AN EXAMINATION OF ALL OF THE BANKING RECORDS AND BUSINESS PRACTICES OF A DENTIST WITHOUT HIS CONSENT? (2) BY ITS

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OVERBREADTH ALLOWS AN EXAMINATION ON WHICH TO BASE THE CONCLUSION A DENTIST LACKS THE ABILITY TO MANAGE "HIS PERSONAL AND BUSINESS AFFAIRS"? (3) BY PERMITTING SUCH INVASIONS ALLOWS AN UNREASONABLE SEARCH WITHIN THE MEANING OF SAID AMENDMENT?

As restated by Respondent?

IS FLORIDA PERMITTED, THROUGH THE LEGISLATURE AND UNDER THE POLICE POWERS, TO PROVIDE FOR QUALIFICATIONS AND TO PROHIBIT CERTAIN CLEARLY SET FORTH CONDUCT TO PROTECT THE HEALTH, SAFETY AND WELFARE OF THE PEOPLE OF THE STATE OF FLORIDA?

It is respectfully submitted that part of the argument contained under the first question is also applicable to this question, and there is necessarily some overlapping due to Petitioner's Petitions for which the Respondent apologizes and asks the Court's indulgences in attempting to answer as closely as possible the questions raised and reiterated in various portions of Petitioner's Petitions.

The Respondent, The Florida State Board of Dentistry, has never obtained, searched or in any way used the banking records, check records or business records from the office of the Petitioner. There has never been any search and certainly no illegal search of the Petitioner's records in any way whatsoever. It is also interesting to note that this is the first time this accusation has been made by the Petitioner, and it is factually unsupported and is unfair for the Petitioner to make such statements to the Court as such conduct

never occurred and no information was received or used in any such manner of which the Petitioner well knows.

The record below and the testimony at the hearing was competent and substantial concerning the inability of the Petitioner to practice dentistry and to take care of his office and financial affairs and the testimony of the personnel of his office established this fact without question, and the Petitioner admitted his inabilities, which he termed indiscretions, from the witness stand.

3. IS A STATE STATUTE REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES FOR DENYING A RIGHT UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT IF IT PROVIDES: (1) A DENTIST WHO BECOMES AFFLICTED WITH A MENTAL ILLNESS (AFFLICTED WITH A PSYCHIATRIC DISORDER) AMONG OTHER DENTISTS SIMILARLY SITUATED MAY HAVE HIS DENTAL LICENSE SUSPENDED OR REVOKED WHILE A DENTIST WITH A PHYSICAL DISORDER IS NOT PENALIZED? (2) A DENTIST WHO BECOMES A DRUG ADDICT AMONG OTHER DENTISTS SIMILARLY SITUATED MAY ALSO BE SO PUNISHED.

As restated by Respondent:

CAN A DENTIST, A HABITUAL USER OF INTOXICANTS AND DRUGS WHICH IMPAIRS HIS ABILITY TO PRACTICE DENTISTRY, BE SUBJECT TO HAVING HIS LICENSE REVOKED TO PROTECT THE CITIZENS OF THE STATE OF FLORIDA FROM SUCH DENTIST?

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Again, Respondent without being repetitious would invite the Court's attention to the previous statements in its Brief wherein it was clearly shown that a person who becomes physically disabled might have his license suspended or revoked from the practice of dentistry just as someone who, through the use of intoxicants or drugs, becomes unfit to practice dentistry.

It is interesting to note that the Petitioner cites the case of *Smith v. Texas*, supra, which has been previously cited by the Respondent and clearly stands for the proposition that the State may prescribe qualifications and require examinations and tests of fitness for a person to engage in or remain in a public calling, and we add, such as dentistry.

It is interesting to note that the Petitioner cites part of the Florida Medical Practice Act (F.S. Chapter 458, Sec. 1201) as a model and does not consider it to be vague or indefinite when it contains the language "being *unable* to practice medicine with *reasonable* skill and safety to patients by reasons of illness, drunkenness, excessive use of drugs, narcotics, chemicals, or any other type of material or as a result of any mental or physical condition." (Emphasis supplied)

Apparently Petitioner takes exception to what he has termed vagueness in the dental law with respect to the words "reasonable" or "unfit to practice," but has no quarrel with the medical law which uses the terms "reasonable skill" and "reasonable safety" and "unable to practice."

The dental law of Florida allows a dentist to petition to have his license reinstated, and actually affords the dentist the same safeguards, if not stronger safeguards, under the dental law as compared to the medical law, which is of course not before this Court.

Petitioner cites from an opinion of this Court language that a drug addict may be confined for treatment for the protection of society. With this we have no quarrel and show that the Petitioner has not been confined by the Board nor convicted of any crime. The Petitioner has been removed from the practice of dentistry for the purpose of protecting the general safety and welfare of the people of the State of Florida.

In all probability, a person afflicted with a physical disorder rendering him unfit for the practice of dentistry, such as a nervous defect which would cause his hand to jerk and injure tissue of the mouth or subject the patient to injury, would not be allowed to practice dentistry to protect the general welfare and safety of the public. Again, this would not be in the form of punishment but would be in the exercise of the police powers to protect the general public.

Although we have already cited the report of the Board of Trustees of the American Medical Association, which had nothing to do with the hearing or in fact has nothing to do with these Petitions, but as pointed out earlier, it is interesting to note that the report recognizes the risk to the safety of the patients in connection with mental disorders and further that the medical boards have before them numbers of cases involving alcoholics and drug addicts which come before the medical boards as disciplinary bodies.

4. IS A DENIAL OF THE RIGHT TO THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES FOR AN ADMINISTRATIVE BOARD HEARING AN ACCUSATION OF MISCONDUCT CHARGED AGAINST A

DENTIST TO: (1) REQUIRE THE ACCUSED DENTIST TO DEFEND HIS PROFESSIONAL LICENSE WITHIN SEVENTEEN DAYS AFTER SAID DENTIST WAS ABLE TO RETAIN COUNSEL, WHERE THE ATTEMPT TO RETAIN COUNSEL WAS LIMITED DUE TO FINANCIAL REASONS? (2) REQUIRE THE ACCUSED TO DEFEND WITHIN SEVENTEEN DAYS AFTER RETAINING COUNSEL WHEN THE ATTORNEY RETAINED ASKED FOR A BILL OF PARTICULARS AND A CONTINUANCE, UNDER THE CIRCUMSTANCES, AND BOTH REQUESTS WERE DENIED? (3) ALLOW AN ATTORNEY ONLY SEVENTEEN DAYS TO PREPARE A MEANINGFUL DEFENSE IN SUCH A CASE WHERE HE NEEDS TO FIND APPLICABLE LAW, LOCATE AND INTERVIEW AVAILABLE WITNESSES DURING WHAT WAS MOSTLY A HOLIDAY SEASON, TAKE REQUIRED DEPOSITIONS, CAUSE THE NECESSARY SUBPOENAS TO BE ISSUED IN JACKSONVILLE, FLORIDA, AND RETURNED TO MIAMI, FLORIDA, WHERE SERVICE ON SAID WITNESSES WAS REQUIRED IN MIAMI, DADE COUNTY, FLORIDA, AND SANFORD, SEMINOLE COUNTY, FLORIDA? (4) PROVIDE THE ACCUSED DENTIST WITH AN ACCUSATION THAT RECITED CERTAIN CHARGES OF ALLEGED MISCONDUCT BUT SPECIFICALLY STATE AT SEVERAL PLACES IN THE ACCUSATION ". . . BUT NOT LIMITED THERETO"? (5) PROVIDE THE ACCUSED DENTIST WITH AN ACCUSATION DRAFTED ONLY IN THE PAST TENSE BASED UPON A STATUTORY PROVISION PROSCRIBING CONDUCT OF WHICH THE ACCUSED "IS" GUILTY? (6) PROVIDED

THE ACCUSED DENTIST WITH A DETERMINATION OF FACT CONTAINING A CONCLUSION OF GUILT BASED UPON CERTAIN ALLEGATIONS STATED BUT FOLLOWED BY ". . . BUT NOT LIMITED THERETO"? (7) ALLOW THE ATTORNEY WHO ACTED AS THE PROSECUTOR OF THE ACCUSED DENTIST IN THE HEARING OF THE MATTER ON BEHALF OF THE BOARD ALSO TO ADVISE THE BOARD, ALL OF WHOM WERE LAYMEN, ON QUESTIONS OF LAW THAT AROSE DURING THE HEARING? (8) REVOKE THE LICENSE OF A DENTIST PERMANENTLY FOR CONDUCT DONE BEFORE THE DENTIST HAD BEEN HOSPITALIZED AND HAD RECEIVED THREE MONTHS OF PSYCHIATRIC REHABILITATIVE TREATMENT, AND HAD BEEN RETURNED TO THE PRACTICE OF DENTISTRY BY THE ATTENDING PSYCHIATRIST?

As restated by Respondent:

IS THE ACCUSED IN AN ADMINISTRATIVE HEARING AFFORDED DUE PROCESS OF LAW WHEN HE IS GIVEN PROPER AND APPROPRIATE NOTICE UNDER THE STATUTES, HAS COUNSEL, SUBPOENAS WITNESSES, MAKES A JUDICIAL ATTACK UPON THE BOARD'S PROCEEDINGS PRIOR TO THE HEARING, WHICH THE CIRCUIT COURT (OF FLORIDA) DENIED, ATTENDS THE HEARING REPRESENTED BY COUNSEL AND PRESENTS TWENTY-SEVEN WITNESSES IN THE ACCUSED'S CASE, HAS A FULL REVIEW OF ALL MATTERS PRIOR TO THE HEARING AND AT THE HEARING, IS GIVEN FULL OPPOR-

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TUNITY TO BE HEARD, AND, SUBSEQUENT TO THE HEARING, A COMPLETE REVIEW BY A FLORIDA APPELLATE COURT AND A FURTHER REVIEW BY THE SUPREME COURT OF FLORIDA?

The Respondent in its statement of facts attempts to set forth in chronological order the Accusation, Notice, Motions, the collateral judicial attack on the law and an attempt to forestall a hearing, the actual charges or accusation brought against the accused dentist, and his full opportunity to be heard.

In addition, the Board has attempted to show the complete review of the cases in the Florida Courts. It was certainly the opinion of the Courts below that the Petitioner had clear and concise charges spelled out in detail with ample opportunity to be heard and with competent, substantial evidence to sustain the charges.

The question concerning "but not limited thereto" can quickly be answered by the following citation of law and excerpt from Respondent's Brief below:

> "The reason for inserting Section 466.24 (3) (n) or the statement in addition to the other Statutes 'but not limited thereto' was in strict keeping with the Supreme Court of Florida's statement in the case of *Florida Board of Pharmacy v. Levin*, 190 So.2d 768, wherein an incorrect section of law was cited as having been violated, that the added language 'was harmless surplusage' and nothing more, and the Supreme Court went on to say:
>
> > 'Licensed pharmacists undoubtedly are familiar with the laws regulating their profession and

must be presumed to have knowledge of F.S. Section 404.02(1), F.S.A., of the Florida Barbiturate Law, which makes it unlawful to deliver to another any barbiturate or central nervous stimulant except upon prescription, with certain exceptions not material to this case. It is quite apparent F.S. Section 404.02(1), F.S.A., was the statute intended to be coupled with the allegations of the complaint, since it logically complements the preceding language of the charge. Technical niceties based upon obvious mistakes and misreferences, which do not mislead or result in manifest unfairness are not grounds under our authorities for overturning administrative determinations. The fact that the Board in its order found Levin guilty of having violated "the provisions of Chapter 404, F.S., relating to the dispensing of certain drugs containing amphetamine salts without first being furnished a prescription," does not nullify the administrative determination since this language sufficiently indicates to all concerned the nature of the violation actually committed even though a nonexistent section of statute was erroneously alluded to in the charge.'

In an abundance of caution, the above language was used by the Board."

The statements of the Petitioner concerning the term "is" in relationship to a violation of the law and the fact that the Accusation was drafted in the past tense is borderline on being ridiculous, as a violation of the law must have been committed in the past for it to be a violation. Certainly the Board has no authority to accuse anyone of violating

the law in the future and would not do so. The Supreme Court of Florida when confronted with a similar argument on the constitutionality of Florida Statutes 466.29, which reads in part "When it appears to the board that any person *is* practicing dentistry . . . .," said in the case of *Beckerman v. Finley*, Fla. 183 So.2d 535:

> "In order to invoke the injunction power of the court the Board must establish a prima facie case by sufficient pleading and proof showing that the person complained against *has been practicing* dentistry . . . ." (Underscoring supplied)

It is abundantly clear that the Supreme Court of Florida had no difficulty in quickly disposing of this contention.

Petitioner's last argument under his purported Fourth Federal Question is factually incorrect. The attorney for the Respondent presented the evidence against the Petitioner at the hearing and in no way took part in the hearing otherwise, as is stated by the Petitioner himself on page 19. The Board made its ruling on legal questions as they arose throughout the hearing and made its finding of guilty. There is nothing inconsistent or in anyway improper in the Board's and its attorney's conduct.

The Respondent has attempted to answer the Petitioner's Petitions in every respect even though Respondent feels that most, if not all, of the matters contained in the Petitioner's Petitions are factually unfounded and immaterial to the question of jurisdiction in this case.

CONCLUSION

It is respectfully submitted that the Petitioner has set forth no valid consideration governing review on certiorari and that this Court should deny the Petitions for Certiorari.

Respectfully submitted,

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Jacksonville, Florida 32202

Attorney for Respondent

CERTIFICATE OF SERVICE

I DO CERTIFY that copy hereof has been furnished by mail this ..... day of January, 1973, to Glyn Dial Ellis, Esquire, Attorney for Petitioner, Suite 518, 1451 North Bayshore Drive, Miami, Florida 33132.

.....

Attorney

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